1624

Supra

FIRST DRAFT FOR CASE.

Tribunal of Arbitration under Treaty and Convention between Great Britain and the United States of America relating to Bering Sea.

INTRODUCTION TO CASE.

Description of the Bering Sea.

"BERING SEA" is the northern portion of the Pacific Ocean lying between Bering Strait on the north and the Aleutian Islands and Peninsula on the south.

Bering Strait, the entrance from the Arctic Ocean to the North Pacific, is 48 marine miles wide.

At the entrance of this sea, from the main North Pacific Ocean, the distance from mainland to mainland, following the arc of the Aleutian Islands, is 1,218 miles.

The Island of Attu is at the extreme end of the Aleutian Islands, and from it to the nearest island on the opposite Asiatic coast, namely, Copper Island, the distance is 175 miles.

Attu Island is 855 marine miles from the mainland of the American Continent, and Copper Island is 180 miles from Cape Kamschatka, the nearest point on the Asiatic Continent.

The extreme width of the Bering Sea between Bristol Bay, on the American Continent, and Cape Ozernoi, on the Asiatic, is 1,260 miles.

The Island of St. Lawrence is 100 miles from Bering Strait, and from its extreme point to the entrance from the main North Pacific Ocean is a distance of 805 miles.

The Pribyloff or Seal Islands are 180 miles from the nearest land, Unalaska Island.

The area of this sea is at least two-thirds as great as that of the Mediterranean, and more than twice that of the North Sea.

The distance from the most western island belonging now to the United States to the nearest point on the Asiatic shore is 367 miles,

and from the same island to the nearest Russian island is 175 miles.

From the north-west of the American continent, a spur of land extending south-westerly break into a series of islands and rocks. These islands stud the Pacific Ocean until Attou is reached.

Bering Sea is described in the Geographies and Gazetteers of England and of the United States as being "that part of the North Pacific Ocean between Aleutian Islands and Bering Strait."

The aggregate widths of the "Passes" through the Aleutian chain of islands exceed by much the similar measurement of the islands themselves.

From the southern to the northern part of what are now known as the North and South Pacific Oceans was in the beginning of this century termed the Pacific or South Sea, being reached in the days of Cook and Vancouver by sailing south, rounding "The Cape," or doubling "The Horn."

Russian, English, French, and Portuguese, as well as citizens of the United States, traded with the natives of the north-west coast both before and after 1799, when Emperor Paul of Russia granted to the Russian-American Company certain exclusive privileges of commerce on all the coasts of America on the Pacific north of latitude 55° north—"exclusive," in the words of Mr. Adams, the then Secretary of State for the United States—"with reference to other Russian subjects."

July 22, 1823 Mr. Adams to Mr. Middleton.

In 1821, Alexander, Emperor of Russia, proclaimed for the first time the sovereignty of Russia over the open waters of the North Pacific Ocean.

By a Ukase, Russia, in this year, claimed exclusive jurisdiction over the Pacific Ocean from Bering Straits to 55° north latitude.

The position was relinquished by Russia after much negotiation and correspondence, and on the 17th April, 1824, a Convention was concluded between the Utnied States and that country, which was ratified at Washington on the 12th January, 1825, and of which the 1st Article is as follows:—

See American State Papers, Foreign Relations, vol. v, p. 433.

"It is agreed that in any part of the Great Ocean, commonly called the Pacific Ocean or South Sea, the

"State Papers," vol. xii, p. 595.

respective citizens or subjects of the High Contracting Powers shall be neither disturbed nor restrained, either in navigation or in fishing, or in the power of resorting to the coasts upon points which may not already have been occupied for the purpose of trading with the natives, saving always the restrictions and conditions determined by the following Articles."

The conditions and restrictions relate chiefly to the prevention for illicit trade in spirituous liquors, fire-arms, &c.

Negotiations between Great Britain and Russia on the subject of the same Ukase resulted in a Treaty between the two Powers, concluded on the 28th February, 1825.

This Treaty contained the following provision, in which the right of fishing and navigation by Great Britain in any part of the Pacific Ocean is recognized :—

'State Papers," vol. xii, p. 38.

"It is agreed that the respective subjects of the High Contracting Parties shall not be troubled or molested in any part of the ocean, commonly called the Pacific Ocean, either in navigating the same, in fishing therein, or in landing at such parts of the coast as shall not have been already occupied, in order to trade with the natives under the restrictions and conditions specified in the following Articles."

From this date until after the cession of Alaska to the United States of America, there was neither an assertion nor exercise of the jurisdiction claimed in the Ukase.

For Treaty of Cession, Russia and United States (English and French version), see Appendix.

On the 28th May, 1867, the Treaty of Cession was signed.

It was not until recently that a claim of exclusive jurisdiction outside of the 3-mile limit was advanced by the United States.

Neither the Treaty nor the legislation which followed the cession of Alaska indicated the transfer or acquisition of extraordinary jurisdiction in Bering Sea.

Legislation.

On the 27th July, 1868, an Act passed the Congress of the United States,* entitled "An Act to extend the Laws of the United States relating to Customs and Navigation over the territory ceded to the United States by Russia, to establish a Collection District therein, and for other purposes."

On the 3rd March, 1868, an Act was passed (section 1959), reserving for Government pur-

* Now chapter iii of Title XXIII of the Revised Statutes, secs. 1954–1986.

poses the Islands of St. Paul and St. George, and forbidding any one to land or remain there without permission of the Secretary of the Treasury.

The following sections from the United States' Revised Statutes contain the following provisions which were enacted on the 1st July, 1870:—

"*United States' Revised Statutes.*

"Section 1954. The laws of the United States relating to customs, commerce, and navigation are extended to and over all the mainland, islands, and waters of the territory ceded to the United States by the Emperor of Russia by Treaty concluded at Washington on the 30th day of March, A.D. 1867, so far as the same may be applicable thereto.

"Section 1956. No person shall kill any otter, mink, marten, sable, or fur-seal, or other fur-bearing animal within the limits of Alaska territory, or in the waters thereof. . . .

"Section 1957. . . . The collector and deputy collectors appointed for Alaska territory, and any person authorized in writing by either of them, or by the Secretary of the Treasury, shall have power to arrest persons and seize vessels and merchandize liable to fines, penalties, or forfeitures under this and the other laws extended over the territory. . . ."

On this date also was approved "An Act to prevent the Extermination of Fur-bearing Animals in Alaska."

For the Act to prevent extermination of fur-bearing animals in Alaska, see Appendix.

Under this Act a law was executed the 3rd August, 1870, on behalf of the United States' Government in favour of the Alaska Commercial Company.

For United States to Alaska Commercial Company, August 3, 1890, see Appendix.

It covered the Islands of St. George and St. Paul only.

The Committee of Ways and Means of the House of Representatives in 1876 reported, after taking testimony, that—

44th Congress, 1st Sess., Report No. 623.

"When the proposition to purchase the Alaska territory from Russia was before Congress, the opposition to it was very much based on alleged barrenness and worthlessness of the territory to be acquired. It was supposed that though there might be many political reasons for this addition to the American Pacific possessions, there were not commercial or revenue advantages. The value of those seal islands was not considered at all. Russia had derived but little revenue from them, indeed a sum not sufficient to pay the contingent expenses of maintaining the official authority."

Non-assertion of exclusive authority over Bering Sea by United States.

Notwithstanding, however, this absence of a general knowledge and appreciation of the value of the rookeries and seal fisheries in 1867, it is found that from 1867 down to and including 1885, vessels continued to visit and hunt in Bering Sea without interference when outside of the ordinary territorial jurisdiction.

Schooners from British Columbia were fishing in 1866; seals to the number of 20,000 a-year were reported as being taken south of St. George and St. Paul in 1872.

H. R., Ex. Doc. No. 177, 40th Cong., 2nd Sess., vol. xiii, p. 255.

In that year expeditions for Bering Sea were fitted out in Australia and British Columbia.

In 1875 a steamer was reported as hunting among the seal islands.

In 1880 vessels were fitted out in San Francisco, and regularly cruized in Bering Sea for the purpose of hunting seals.

Sealing-vessels and their catches were reported by the United States' cutter "Corwin," but none were interfered with when outside of the 3-mile limit.

H. R., Ex. Doc. No. 3883, 50th Cong., p. 58.

An Agent of the United States' Government reported in 1881 that 100 vessels had been sealing about the Pribyloff Islands for twenty years.

Ibid.

The Agents of the United States' Government sent to the seal islands previous to 1886 continually reported upon the inadequacy of the protection of the islands.

They referred to depredations upon the rookeries.

From every source it appears that, during the years 1867–86, notwithstanding the presence of seal-hunting craft in Bering Sea, the United States' authorities confined the exercise of jurisdiction to the mainland, to the islands, and to the ordinary territorial limits thereof.

Mr. Boutwell was Secretary of the United States' Treasury in the year the Act for the leasing and organization of the seal islands was passed.

41st Cong., 2nd Sess., Ex. Doc. No. 109.

His Report preceded the Act of the 1st July, 1870.

The Report discloses no suggestion of authority at a greater distance than 3 miles from the shore-line.

With the knowledge of the raids upon the islands and the existence of seal-hunting schooners, Mr. Boutwell dwelt upon the means of protecting the seal islands only.

In 1872, Collector Phelps inclosed to Mr. Secretary Boutwell newspaper clippings reporting expeditions fitting out in Australia and Victoria for the purpose of taking seals in the Bering Sea while passing to and from their rookeries on St. Paul and St. George Islands. This he feared would not only indiscriminately kill young and female seals, but have the effect of driving the seals from their usual haunts; and he concludes by questioning whether "the Act of the 1st July, 1870, relating to those fisheries, does not authorize his interference by means of the revenue cutters to prevent foreigners and others from doing such irreparable mischief to this valuable interest;" and recommends that a steam-cutter be sent to the region of Ounimak Pass and the Islands of St. Paul and St. George by the 15th May, 1873.

Mr. Secretary Boutwell informed Collector Phelps he did not consider it expedient to send a cutter at present to interfere with the operation of foreigners, and stated:— April 19, 1873.

"In addition, I do not see that the United States would have the jurisdiction or power to drive off parties going up there for that purpose unless they made such attempt within a marine league of the shore."

Mr. McIntyre was the Treasury Agent at Attu Islands in 1875.

He gave it as his opinion that, in protecting the islands, he could repel by force "any attempt to kill seals in the rookeries or within a rifle shot of the shore."

Ivan Petroff, the Special Agent of the United States' Government, in 1880, reported:—

"The fur trade of this country, with the exception of that confined *to the seal islands* and set apart by law, is free to all legitimate enterprise."

The Treaty of 1867, as has been seen, is silent as to special rights in the waters of Bering Sea. The debates of Congress fail to disclose that on any occasion from 1867 to 1886 it occurred to one of the statesmen of the United States to assert that Russia either had a title to or intended to transfer more than the islands in a certain portion of Bering Sea and Alaska on the mainland.

The instructions given from time to time to Commanders of the Revenue Service, or of ships

of war of the United States cruizing in Bering Sea, organizing a Government in Alaska and guarding the interests of the Alaska Commercial Company upon the islands leased to the Company, contain no suggestion of the intention of that Government to assert a claim so vehemently disputed when advanced by Russia.

On the contrary, while vessels from British Columbia and elsewhere were trading and fishing generally in the Bering Sea, the instructions relating to the fisheries given to revenue marine ships by the United States' Government until 1886 were confined to the protection of the seal islands from those who were in the habit of landing thereon.

The seizure of British sealers in the open sea followed the Report on the cruize of the revenue marine steamer "Corwin" in the year 1885.

In this Report it is among other things stated that a special look-out was kept for vessels sealing when shaping a course for St. Paul.

The Captain in his Report says :—

"While we were in the vicinity of the seal islands a look-out was kept at the masthead for vessels cruizing, sealing, or illicitly trading *among those islands.*"

Having drawn attention to the number of vessels which sought the seals on the islands, and illustrated the great difficulty of preventing the landing thereupon, the Commander concludes as follows :—

"In view of the foregoing facts, I would respectfully suggest—

"1. That the Department cause to be printed in the western papers, particularly those of San Francisco, California, and Victoria, British Columbia, the sections o the law relating to the killing of fur-bearing animals in Alaskan waters, and defining in specific terms what i meant by Alaskan waters.

"2. That a revenue cutter be sent to cruize in the vicinity of the Pribyloff Islands and Aleutian group during the sealing season."

While the first suggestion was never adopted, no notice nor Act having yet defined what is meant by Alaskan waters, it seems that, in accordance with this Report and other similar representations, the United States' Government sent revenue cutters in 1886 with instructions for the first time to take sealing-vessels.

In 1886 the British schooner "Thornton" was accordingly arrested when 70 miles south-east of St. George Island. First assertion of sovereignty over deep waters of Bering Sea.

The vessel was libelled in a District Court of the United States, and the libel filed by the Attorney for the United States alleged that the vessel was "found engaged in killing fur-seal within the limits of Alaska territory and in the waters thereof, in violation of section 1956 of the Revised Statutes of the United States."

Other seizures followed.

The "Thornton," "Anna Beck," and "W. P. Sayward" were all condemned in 1887 by the District Court of Alaska upon the ground that Russia had ceded not only Alaska and the islands within certain limits of Bering Sea, but the sea itself within those limits.

The counsel, Mr. A. K. Delaney, who appeared for the United States' Government, filed a "brief," in which the following doctrine was put forward:— Bering Sea said to be an inland water.

"*Bering Sea Inland Water.*

"It thus appears that from our earliest history, contemporaneously with our acceptance of the principle of the marine league belt, and supported by the same high authorities, is the assertion of the doctrine of our right to dominion over our inland waters under the Treaty of 1867, and on this rule of international law we base our claim to jurisdiction and dominion over the waters of the Bering Sea. While it is, no doubt, true that a nation cannot by Treaty acquire dominion in contravention of the law of nations, it is none the less true that, whatever title or dominion our grantor, Russia, possessed under the law of nations at the time of the Treaty of Cession in 1867, passed and now rightfully belongs to the States.

". . . . Bering Sea is an inland water."

The Governor of Alaska referred to the action of the United States' cutters in 1886 and 1887 as the first assertion of the jurisdiction of the United States over that portion of Bering Sea ceded by Russia. In his Report, 1886-87.

Sir L. S. Sackville-West, British Minister in Washington, made a formal protest in the name of Her Majesty's Government against these seizures. Hesitancy on part of United States.

Thereupon Attorney-General Garland issued the following order:—

"Judge Lafayette Dawson and M. D. Ball, United States' District Attorney, Sitka, Alaska.

"I am directed by the President to instruct you to discontinue any further proceedings in the matter of the

seizure of the British vessels 'Carolina,' 'Onward,' and 'Thornton,' and discharge all vessels now held under such seizure, and release all persons that may be under arrest in connection therewith."

Renewed seizures.

Fresh seizures through July and August of 1887 were repeated. During those two months the United States' revenue cutter "Richard Rush" captured the British Columbian fishing schooners "W. P. Sayward," 59 miles, "Dolphin," 40 miles, "Grace," 96 miles, and "Anna Beck," 66 miles, from Unalaska Island; and the "Alfred Adams," 60 miles from the nearest land.

Formal protest was again made.

No seizure occurred in 1888, though British sealing-vessels made large catches in that year in Bering Sea. In 1889 British ships were ordered out of Bering Sea, but not confiscated.

No seizures have occurred subsequently, though a large number of sealers visited the sea in 1890.

The legality of the seizures at once became a subject of much discussion in the United States.

Refusal of Congress to define rights of United States.

During the fiftieth Session of the House of Representatives, the Committee on Marine and Fisheries was directed "to fully investigate and report upon the nature and extent of the rights and interests of the United States in the fur-seal and other fisheries in the Bering Sea in Alaska, whether and to what extent the same had been violated, and by whom, and what, if any, legislation is necessary for the better protection and preservation of the same."

The Committee reported, upholding the claim of the United States to jurisdiction over all waters and land included in the Treaty of Cession by Russia to the United States, and construing different Acts of Congress as completing the claim of national territorial rights to cover the open waters of Bering Sea outside of the 3-mile limit.

The concluding portion of the Report states, among other things, as follows:—

"That the chief object of the purchase of Alaska was the acquisition of the valuable products of the Bering Sea.

"That at the date of the cession of Alaska to the United States, Russia's title to Bering Sea was perfect and undisputed.

"That by virtue of the Treaty of Cession, the United States acquired complete title to all that portion of

Bering Sea situated within the limits prescribed by the Treaty.

"The Committee herewith report a Bill making necessary amendments of the existing law relating to these subjects and recommend its passage."

The Bill reported contained the following section:—

"Section 2. That section 1956 of the Revised Statutes of the United States was intended to include and apply, and is hereby declared to include and apply, to all the waters of Bering Sea in Alaska embraced within the boundary-lines mentioned and described in the Treaty with Russia, dated the 30th March, A.D. 1867, by which the territory of Alaska was ceded to the United States; and it shall be the duty of the President, at a timely season in each year, to issue his Proclamation, and cause the same to be published for one month in at least one newspaper published at each United States' port of entry on the Pacific coast, warning all persons against entering said territory and waters for the purpose of violating the provisions of said section; and he shall also cause one or more vessels of the United States to diligently cruize said waters and arrest all persons and seize all vessels found to be, or to have been, engaged in any violation of the laws of the United States' therein."

After a refusal by the Senate to go so far, a Conference of the Houses resulted in the abandonment of this clause, and the Act of the 3rd March, 1889, leaving the law in this respect unchanged, was approved by the President.

On the 19th August, 1887, after the seizure of the "Sayward," and while she was in custody, the United States' Secretary of State wrote identic instructions to the United States' Ministers in France, Germany, Great Britain, Japan, Russia, and Sweden and Norway in the following terms:—

"Recent occurrences have drawn the attention of this Department to the necessity of taking steps for the better protection of the fur-seal fisheries in Bering Sea *Without raising any question* as to the *exceptional measures* which the particular character of the property in question *might justify* this Government in taking, and *without* reference to any *exceptional marine jurisdiction* that *might* properly be *claimed* for that end, it is deemed *advisable*, and I am instructed by the President so to inform you, *to attain the desired ends by* INTERNATIONAL CO-OPERATION. Ex. Doc., p. 106.

* * * *

"Under these circumstances, and in view of the *common interests* of ALL *nations* in preventing the indiscriminate destruction and consequent extermination of an animal which contributes so materially to the *commercial wealth*

and *general use of mankind*, you are hereby instructed to draw the attention of the Government to which you are accredited to the subject, and *invite* it to enter *into such an arrangement* with the Government of the United States as will prevent the citizens of either country from killing seal in Bering Sea at such times and places, and by such methods as at present pursued, and which threaten the speedy extermination of these animals and consequent serious *loss to mankind*."

So to Mr. White, Secretary of the United States' Legation in London, with reference to this proposition, he wrote:—

"The suggestion made by Lord Salisbury, that *it may be necessary* to bring other Governments than the United States, Great Britain, and Russia into the arrangements, *has already been met* by the action of the Department. As I have heretofore informed you, at the same time the *invitation was sent* to the British Government to *negotiate a Convention for seal protection in Bering Sea*, a like invitation was extended to various other Powers, which have, without exception, returned a favourable response. In order, therefore, that the plan may be carried out, the Convention proposed between the United States, Great Britain, and Russia, *should contain a clause providing for the subsequent admission of other Powers*."

In 1888, moreover, the Secretary of State for the United States apparently considered it impossible to take the ground suggested by the Bill as first reported upon by the Committee of Marine and Fisheries.

In a despatch to the Minister at the Court of St. James' (the 7th February, 1888), when dealing with the slaughter of seals in Bering Sea, he wrote:—

"The only way of obviating the lamentable result above predicted appears to be by the United States, Great Britain, and other interested Powers taking concerted action to prevent their citizens or subjects from killing fur-seals with fire-arms or other destructive weapons north of 50° of north latitude, and between 160° of longitude west and 170° of longitude east from Greenwich, during the period intervening between the 15th April and 1st November. To prevent the killing within a marine belt of 40 or 50 miles from the islands during that period would be ineffectual as a preservative measure. This would clearly be so during the approach of the seals to the islands. And after their arrival there such a limit of protection would also be insufficient, since the rapid progress of the seals through the water enables them to go great distances from the islands in so short a time that it has been calculated that an ordinary seal could go to the Aleutian Islands and back, in all a distance of 360 or 400 miles, in less than a day."

Negotiations were accordingly set on foot looking towards the establishment of a close season covering the waters of Bering Sea by the Powers interested.

On the 10th September, 1887, the Marquis of Salisbury addressed Sir Lionel West, British Minister at Washington, as follows :—

"The claim thus set up appears to be founded on the exceptional title said to have been conveyed to the United States by Russia at the time of the cession of the Alaska Territory. The pretension which the Russian Government at one time put forward to exclusive jurisdiction over the whole of Bering Sea was, however, never admitted either by this country or by the United States of America."

Upon this paragraph the discussion between Her Majesty's Government and the Government of the United States was carried on for some years until Mr. Blaine's despatch of the 22nd January, 1890, to Sir Julian Pauncefote, wherein he proposed to justify the action of his Government upon the ground that it was *contra bonos mores* to engage in the killing of seals at sea.

Mr. Blaine, on the 29th May, 1890, writes as follows to the British Minister :—

"I am further instructed by the President to say that while your propositions of the 30th April cannot be accepted, the United States *will continue the negotiation* with the hope of *reaching an agreement* that may conduce to a good understanding, and leave no cause for future dispute."

On the 17th December, 1890, the Secretary of State writes to the British Minister, in which, still refraining from the assertion of any exclusive sovereignty over the open seas in Bering's Sea, he says :—

"The President *will ask* the Government of Great Britain *to agree* to the distance of 20 marine leagues within which no ship shall hover around the Islands of St. Paul and St. George from the 15th May to the 15th October of each year. This will prove an effective mode of preserving the seal fisheries *for the use of the civilized world.*"

In his note of the 17th December, 1890, Mr. Blaine abandons altogether the argument that the Bering Sea is *mare clausum*, but enters upon an argument to prove that exclusive jurisdiction over 100 miles from the coast in the Bering Sea is vested in the United States.

In this note, the Secretary of State for the United States wrote:—

"The repeated assertions that the Government of the United States demands that the Bering Sea be pronounced *mare clausum* are without foundation. The Government has never claimed it, and never desired it. It expressly disavows it."

The explanation of the United States touching the question of jurisdiction since the seizures of 1886 has varied on several occasions.

The contention that seal hunting at sea was *contra bonos mores* followed the assertion and abandonment of the doctrine of *mare clausum*.

This was succeeded by the claim that a special property in the seals born on property of that country was vested in the United States by virtue of the place of birth.

In his despatch of December 1890, Mr. Blaine joins issue upon the statement made on behalf of Great Britain, that the phrase "Pacific Ocean as used in the Treaties" of 1824 and 1825 was intended to include, and includes, the body of water now known as Bering Sea; and he remarks that upon this issue the whole question between the two countries depends.

CASE.

Under Article VI of the Treaty and Convention between Great Britain and the United States of America relating to Bering Sea, signed at Washington on the 29th February and the 28th April, 1892, it is provided that—

"In deciding the matters submitted to the Arbitrators, it is agreed that the following five points shall be submitted to them, in order that their award shall embrace a distinct decision upon each of said five points, to wit:—

"1. What exclusive jurisdiction in the sea now known as the Bering Sea, and what exclusive rights in the seal fisheries therein, did Russia assert and exercise prior and up to the time of the cession of Alaska to the United States?

"2. How far were these claims of jurisdiction as to the seal fisheries recognized and conceded by Great Britain?

"3. Was the body of water now known as the Bering Sea included in the phrase 'Pacific Ocean,' as used in the Treaty of 1825 between Great Britain and Russia, and what rights, if any, in the Bering Sea were held and exclusively exercised by Russia after said Treaty?

"4. Did not all the rights of Russia as to jurisdiction, and as to the seal fisheries in Bering Sea east of the water

boundary, in the Treaty between the United States and Russia of the 30th March, 1867, pass unimpaired to the United States under that Treaty?

"5. Has the United States any right, and, if so, what right, of protection or property in the fur-seals frequenting the islands of the United States in Bering Sea when such seals are found outside the ordinary 3-mile limit."

It will be seen that:—

Points 1, 2, 3, and 4 relate to Russia's claim to Bering Sea, and to the transfer of Alaska and certain islands in part of that sea to the United States of America.

Point 5 raises a question as to the property in seals.

It is not admitted by Great Britain that the mere assertion, if by assertion he meant claim, or by the exercise only of exclusive authority, Russia could have acquired any jurisdiction over Bering's Sea.

It will be contended, moreover, that the concession or recognition of Russia's claims to jurisdiction over any particular seal fisheries—if ever made—on the part of one of the Powers could not invest Russia with a title or property under the principles of international law.

In the consideration of these Points, the British Case will deal with "the questions which have arisen between the Government of Her Britannic Majesty and the Government of the United States concerning the jurisdictional rights of the United States in the waters of Bering's Sea, and concerning also the preservation of the fur-seal in or habitually resorting to the said sea, and the rights of the citizens and subjects of either country as regards the taking of fur-seal in or habitually resorting to the said waters," which under Article I of the Convention have been submitted to the Tribunal of Arbitration.

Taking up Points 1 and 2 together for the sake of convenience, the various Points under Article VI will be examined in the light of the general reference in Article I.

The first question of the Case is:—

What exclusive jurisdiction in the sea, now known as the Bering Sea, and what exclusive rights in the seal fisheries therein did Russia assert and exercise prior and up to the time of the cession of Alaska to the United States?

The second question is:—

How far were these claims to jurisdiction as to

the seal fisheries recognized and conceded by Great Britain?

Ukase of Paul I, 1799.

The following is a literal translation of the Ukase granted by Paul I to the Russian-American Company, taken from "Golovnin," in "Materialui," i, 77-80:—

Bancroft's works, vol. xxxiii, History of Alaska, 1730–1885, pp. 379-380.

"By the grace of a merciful God, we, Paul I, Emperor and Autocrat of All the Russias, &c. To the Russian-American Company, under our highest protection, the benefits and advantages resulting to our Empire from the hunting and trading carried on by our loyal subjects in the north-eastern seas and along the coasts of America have attracted our Royal attention and consideration; therefore, having taken under our immediate protection a Company organized for the above-named purpose of carrying on hunting and trading, we allow it to assume the appellation of 'Russian-American Company under our highest protection;' and for the purpose of aiding the Company in its enterprises, we allow the Commanders of our land and sea forces to employ said forces in the Company's aid if occasion requires it, while for further relief and assistance of said Company, and having examined their Rules and Regulations, we hereby declare it to be our highest Imperial will to grant to this Company for a period of twenty years the following rights and privileges:—

"1. By the right of discovery in past times by Russian navigators of the north-eastern part of America, beginning from the 55th degree of north latitude and of the chain of islands extending from Kamschatka to the north to America and southward to Japan, and by right of possession of the same by Russia, we most graciously permit the Company to have the use of all hunting grounds and establishments now existing on the north-eastern [*sic*] coast of America, from the above-mentioned 55th degree to Bering Strait, and on the same also on the Aleutian, Kurile, and other islands situated in the north-eastern ocean.

"2. To make new discoveries not only north of the 55th degree of north latitude but farther to the south, and to occupy the new lands discovered, as Russian possessions, according to prescribed rules, if they have not been previously occupied by any other nation, or been dependent on another nation.

"3. To use and profit by everything which has been or shall be discovered in those localities, on the surface and in the bosom of the earth, without any competition by others.

"4. We most graciously permit this Company to establish Settlements in future times, wherever they are wanted, according to their best knowledge and belief, and fortify them to insure the safety of the inhabitants, and to send ships to those shores with goods and hunters, without any obstacles on the part of the Government.

"5. To extend their navigation to all adjoining nations

and hold business intercourse with all surrounding Powers, upon obtaining their free consent for the purpose, and under our highest protection, to enable them to prosecute their enterprises with greater force and advantage.

"6. To employ for navigation, hunting, and all other business, free and unsuspected people, having no illegal views or intentions. In consideration of the distance of the localities where they will be sent, the provincial authorities will grant to all persons sent out as settlers, hunters, and in other capacities, passports for seven years. Serfs and house-servants will only be employed by the Company with the consent of their land-holders, and Government taxes will be paid for all serfs thus employed.

"7. Though it is forbidden by our highest order to cut Government timber anywhere without the permission of the College of Admiralty, this Company is hereby permitted, on account of the distance of the Admiralty from Okhotsk, when it needs timber for repairs, and occasionally for the construction of new ships, to use freely such timber as is required.

"8. For shooting animals, for marine signals, and on all unexpected emergencies on the mainland of America and on the islands, the Company is permitted to buy for cash, at cost price, from the Government artillery magazine at Irkutsk yearly 40 lbs. or 50 lbs. of powder, and from the Nertchinsk mine 200 lbs. of lead.

"9. If one of the partners of the Company becomes indebted to the Government or to private persons, and is not in a condition to pay them from any other property except what he holds in the Company, such property cannot be seized for the satisfaction of such debts, but the debtor shall not be permitted to use anything but the interest or dividends of such property until the term of the Company's privileges expires, when it will be at his or his creditors' disposal.

"10. The exclusive right most graciously granted to the Company for a period of twenty years, to use and enjoy, in the above-described extent of country and islands, all profits and advantages derived from hunting, trade, industries, and discovery of new lands, prohibiting the enjoyment of those profits and advantages not only to those who would wish to sail to those countries on their own account, but to all former hunters and trappers who have been engaged in this trade, and have their vessels and furs at those places; and other Companies which may have been formed will not be allowed to continue their business unless they unite with the present Company with their free consent; but such private Companies or traders as have their vessels in those regions can either sell their property, or, with the Company's consent, remain until they have obtained a cargo, but no longer than is required for the loading and return of their vessel; and after that nobody will have any privileges but this one Company, which will be protected in the enjoyment of all the advantages mentioned.

"11. Under our highest protection, the Russian-American Company will have full control over all above-mentioned

localities, and exercise judicial powers in minor cases. The Company will also be permitted to use all local facilities for fortifications in the defence of the country under their control against foreign attacks. Only partners of the Company shall be employed in the administration of the new possessions in charge of the Company.

"In conclusion of this our most gracious order for the benefit of the Russian-American Company under highest protection, we enjoin all our military and civil authorities in the above-mentioned localities not only not to prevent them from enjoying to the fullest extent the privileges granted by us, but in case of need to protect them with all their power from loss or injury, and to render them, upon application of the Company's authorities, all necessary aid, assistance, and protection.

"To give effect to this our most gracious Order, we subscribe it with our own hand, and give orders to confirm it with our Imperial seal.

"Given at St. Petersburgh, in the year after the birth of Christ 1799, the 27th day of December, in the fourth year of our reign.

(Signed) "PAUL."

This Charter, it will be observed, granted to the Russian-Americ . Company the exclusive right of hunting, trade, industries and discoveries of new land on the north-west coast of America from Bering Strait to the 55th degree of north latitude, with permission to the Company to extend their discoveries to the south and to form establishments there, provided they did not encroach upon the territory occupied by other Powers.

The southern limit thus provisionally assigned to the Company corresponds, within 20 or 30 miles, with that which was eventually agreed upon as the boundary between the British and Russian possessions.

It comprises not only the whole American coast of Bering Sea, but a long reach of coast-line to the south of the Alaskan Peninsula, as far as the level of the southern portion of Prince of Wales' Island.

The Charter, which was issued at a time of great European excitement, attracted apparently little attention at the moment, and gave rise to no remonstrance.

It made no claim to exclusive jurisdiction over the sea, nor do any measures appear to have been taken under it to restrict the commerce, navigation, or fishery of the subjects of foreign nations.

It refers to the Aleutian Islands and the Kurile Islands as situated in the "North-eastern [*sic*] Ocean."

It refers also to the north-*west* coast of America as the "north-*eastern* part of America."

From this period until 1821 there is no pretence, either by the Ukase or afterwards by acts of the Company or of the Russian Government, of exclusive rights as against the world outside of the ordinary territorial limit.

Russian territorial claim in 1821.

Mr. Adams, Secretary of the United States, established clearly that even as late as 1823 Russian rights in the region under consideration "were confined to certain *islands* north of the 55th degree of latitude," and had "no existence in the continent of America."

Bancroft, the United States' historian, tells us that in 1799 there was no Russian Settlement outside of the islands.

The limits in the Ukase within which the Russian Company were given these exclusive hunting rights extended from 45° of north latitude to 51° north on the western coast of America.

That Russia had no authority to concede exclusive rights as against subjects other than her own over that coast or sea, where discoverers of every nation were continually exploring, and whither traders resorted from various parts of the world, is clearly shown by Mr. Adams.

Writing (22nd July, 1823) to Mr. Middleton, Mr. Adams observed:—

American State Papers, Foreign Relations, vol. v p. 436.

"It does not appear that there ever has been a permanent Russian Settlement on this continent south of latitude 59°, that of New Archangel, cited by M. Poletica, in latitude 57° 30', being upon an island. So far as *prior discovery* can constitute a foundation of right, the papers which I have referred to prove that it belongs to the United States as far as 59° north, by the transfer to them of the rights of Spain. There is, however, no part of the globe where the mere fact of discovery could be held to give weaker claims than on the north-west coast. The great sinuosity, says Humboldt, formed by the coast between the 55th and 60th parallels of latitude, embraces discoveries made by Gali, Bering, and Tchivikoff, Quadra, Cook, La Perouse, Malaspier, and Vancouver. No European nation has yet formed an establishment upon the immense extent of coast from Cape Mendosino to the 59th degree of latitude. Beyond that limit the Russian factories commence, most of which are scattered and distant from each other like the factories established by the European nations for the last three centuries on the coast of Africa. Most of these little Russian Colonies communicate with each other only by sea, and the new dominations of Russian-America or Russian possessions in the new continent must not lead us to believe that the coast

of Bering Bay, the Peninsula of Alaska, or the country of the Ischugatschi have become Russian *provinces* in the same sense given to the word when speaking of the Spanish Provinces of Senora or New Biscay." (Humboldt's "New Spain," vol. ii, Book 3, chap. 8, p. 496.)

"In M. Poletica's letter of the 28th February, 1822, to me, he says that when the Emperor Paul I granted to the present American Company its first Charter in 1799, he gave it the *exclusive possession* of the north-west coast of America, which belonged to Russia, from the 55th degree of north latitude to Bering Strait.

"In his letter of the 2nd April, 1822, he says that the Charter to the Russian-American Company in 1799 was merely conceding to them a part of the sovereignty, *or rather certain exclusive privileges of commerce.*

"This is the most correct view of the subject. The Emperor Paul granted to the Russian-American Company certain exclusive privileges of commerce—exclusive with reference to other Russian subjects; but Russia had never before *asserted* a right of sovereignty over any part of the American continent; and in 1799 the people of the United States had been at least for twelve years in the constant and uninterrupted enjoyment of a profitable trade with the natives of that very coast, of which the Ukase of the Emperor Paul could not deprive them."

Touching the question of Russia's claims, up to 1821, to exclusive jurisdiction over more than certain islands in the Pacific Ocean on the American coast, Mr. Adams, moreover, brought forward, with approval, articles which appeared in "The North American Review," published in the United States, and in the "Quarterly Review," published in England, Annex 1.

Appendix I. Article XVIII, North American Review, vol. xv, Quarterly Review, 1821-22, vol. xxvi.

From the facts disclosed by these articles the Government of the United States took the ground explained by Mr. Adams, that "the right of discovery, of occupancy, of uncontested possession," alleged by Russia, were "all without foundation in fact," as late as the year 1823.

See also Adams to Rush, July 22, 1823, p. 446; American State Papers, Foreign Relations, F. O., p. 446; and also Confidential Memorial inclosed in letter, Middleton to Adams, December 1 (13), 1823, p. 449, American State Papers, Foreign Relations, F. O.

Russia, Spain, Great Britain, and the United States were, through their citizens, all engaged in trading, as well as in the establishment of trading ports upon the north-western coast of America.

While the subjects of each country were doubtless making claims on the part of their respective Rulers from time to time, so uncertain were their claims and the merits of each that in 1818 (20th October), in the Convention between the United States and Great Britain, it was agreed that any "country that may be claimed by either party on the north-west coast of America, westward of the Stony Mountains, shall, together

with its harbours, bays, and creeks, and the navigation of all rivers within the same, be free and open for the term of ten years from the date of the signature of the Convention, to the vessels, citizens, and subjects of the two Powers, it being well understood that this agreement is not to be construed to the prejudice of any claims which either of the two High Contracting Parties may have to any part of the said country, nor shall it be taken to affect the claims of any other Power or State to any part of the said country, the only object of the High Contracting Parties in that respect being to prevent disputes and differences between themselves."

The actual extent of Russian occupation in America at this time (Census of 1819) was at Novo Archangelsk, 198 men, 11 women; Kadiak, and adjoining islands, 73 men; Island of Ookamok, 2 men; Katmai, 4 men; Sutkhumokoi, 3 men; Voskressensky Harbour, 2 men; at Fort Constantine, 17 men; at Nikolai (on Cook Inlet), 11 men; at Alexandrovsk (also on Cook Inlet), 11 men; at the Ross Settlement (California), 27 men; *on the seal islands, 27 men; and at Nushagak,** 3 *men and* 2 *women:* total 391, of whom 13 women. Places in italics the only Settlements in, or on the coast of, Behring Sea, other than Aleutian Islands.

"Tikhmenief," vol. i, pp. 252-253. Annex 6, Bancroft's "Alaska," note to p. 522.

Touching the importance now given to the subject of seals, it is to be noted that the otter, and not the seal, was the most valuable fur-bearing animal sought by hunters and traders at this time. ("Voyage of M. de Krusendern," vol. i, p. 14, given in American State Papers, Foreign Relations, vol. v, F. O., p. 453.) See also "Abstract of Diplomatic Correspondence," p. 455, &c.

Finally, referring to the Ukase of Paul, Mr. Middleton, in giving Mr. Adams a narrative of the proceedings, 7th (19th) April, 1824, leading to the Convention, remarked:—

"The confusion prevailing in Europe in 1799 permitted Russia (who alone seems to have kept her attention fixed upon this interest during that period) to take a decided step towards the monopoly of this trade, by the Ukase of that date, which trespassed upon the acknowledged rights of Spain; but at that moment the Emperor Paul had declared war against that country as being an ally of France. This Ukase, which is, in its form, an act purely domestic, was never notified to any foreign State with

American State Papers, Foreign Relations, vol. v, p. 461.

* The only Settlement on the continent north of the Aleutian Islands.

injunction to respect its provisions. Accordingly, it appears to have been passed over unobserved by foreign Powers, and it remained without execution in so far as it militated against their rights."

From 1799 to 1821, therefore, there is no evidence upon which it can be said that Russia *claimed* exclusive jurisdiction in Bering Sea outside of the ordinary territorial limits.

It was not until 1821 that Russia ventured to *assert*, or, in other words, attempted to vindicate, a claim or title to the islands and a portion of the mainland of the continent of America.

Bancroft, 531, cap. xxvi (1886).

The casual visit of an explorer or of a trader, the temporary establishment of small military posts either on a continent or an island, is not an assertion or vindication of title or of jurisdiction.

In 1821 Russia *claimed* and attempted to assert exclusive jurisdiction over the continent and a large portion of the Pacific Ocean, now known as Bering Sea.

Ukase of Alexander, 1821.

When the term of the First Charter expired, the Russian-American Company numbered among its shareholders Russians of high rank, as well as members of the Royal Family.

Emperor Alexander was a shareholder.

Voyage, M. de Krusenstern, vol. i, p. 14, No. 384, p. 454. American State Papers, Foreign Relations, vol. v.

The main object of the Company had been the same as that of the English or American traders, viz., the traffic in the fur for the Chinese markets.

American State Papers, vol. v, pp. 438–443. Bancroft, p. 528. "Tikhmenief," Ister. Obos. I, cited in note to Bancroft, p. 532.

They, however, found themselves unable to compete with the Americans, who, during the period, were trading on the coast and in the Aleutian Islands, exchanging arms and liquor with the natives for furs.

Accordingly, a Ukase was issued. It was as follows:—

"*Edict of His Imperial Majesty, Autocrat of All the "Russias.*

"The Directing Senate maketh known unto all men: Whereas, in an Edict of His Imperial Majesty, issued to the Directing Senate on the 4th day of September, 1821, and signed by His Imperial Majesty's own hand, it is thus expressed:—

"'Observing from Reports submitted to us that the trade of our subjects on the Aleutian Islands and on the north-west coast of America appertaining unto Russia is subjected, because of illicit and secret traffic, to oppression and impediments, and finding that the principal cause of these difficulties is the want of Rules establishing the

boundaries for navigation along these coasts, and the order of naval communication, as well in these places as on the whole of the eastern coast of Siberia and the Kurile Islands, we have deemed it necessary to determine these communications by specific Regulations, which are hereto attached.

"'In forwarding these Regulations to the Directing Senate, we command that the same be published for universal information, and that the proper measures be taken to carry them into execution.

(Countersigned) "'COUNT DE GURIEF,

"'*Minister of Finances.*

"'It is therefore decreed by the Directing Senate that His Imperial Majesty's Edict be published for the information of all men, and that the same be obeyed by all whom it may concern.'

"The original is signed by the Directing Senate.

"On the original is written in the handwriting of His Imperial Majesty, thus:

"Be it accordingly,

"ALEXANDER.

"'Section 1. The pursuits of commerce, whaling, and fishery, and of all other industry, on all islands, ports, and gulfs, including the whole of the north-west coast of America, beginning from Bering Straits to the 51st of northern latitude; also from the Aleutian Islands to the eastern coast of Siberia, as well as along the Kurile Islands, from Bering Straits to the south cape of the Island of Urup, viz., to the 45° 50′ northern latitude, is exclusively granted to Russian subjects.

"'Sec. 2. It is therefore prohibited to all foreign vessels not only to land on the coasts and islands belonging to Russia, as stated above, but also to approach them within less than 100 Italian miles. The transgressor's vessel is subject to confiscation, along with the whole cargo.'"

The Russian-American Company then obtained an extension of their Charter for another period of twenty years. **For Charter, 1821, see Appendix.**

The jurisdiction of the Company was established by this Charter from the northern cape of Vancouver Island in latitude 51° north to Behring Strait, and beyond and to all islands belonging to that coast, as well as to those between it and the coast of Eastern Siberia; also to the Kurile Islands, where they were allowed to trade as far as the Island of Occupa to the exclusion of other Russian subjects or of foreigners.

Russia, therefore, at this time may be said to have *claimed*, if she did not actively "assert," dominion on the American continent 250 miles further south than ever before.

By this Ukase she gave notice also of an extraordinary pretension to maritime jurisdiction.

This claim to exclude vessels from fur-sealing or trade or other pursuit within 100 miles of the coast was founded expressly on the doctrine of *mare clausum*.

Baron Nicolay to the Marquis of Londonderry the 31st October (12th November), 1821, says :—

". . . . The arrangement appears to me to be as lawful as it is urgent; for, if it is shown that the Imperial Government had strictly the right to close to foreigners that portion of the Pacific Ocean which is bounded by our possessions in America and Asia, *à fortiori* the right in virtue of which it has just adopted a much less restrictive measure should not be called in question."

Upon receiving communication of the Ukase, the British and United States' Governments promptly objected both to the extension of the territorial claim and to the assertion of maritime jurisdiction.

United States' Protest against Ukase of 1821.

On the 30th January (or 11th February) 1822, M. Pierre de Poletica, the Envoy Extraordinary and Minister Plenipotentiary of the Russian Emperor, transmits the Edict to Mr. Adams, Secretary of State for the United States.

On the 25th February, 1822, Mr. Adams wrote M. Poletica :—

"*Department of State, Washington,*

"Sir, "*February* 25, 1822.

"I have the honour of receiving your note of the 11th instant, inclosing a printed copy of the Regulations adopted by the Russian-American Company, and sanctioned by His Imperial Majesty, relating to the commerce of foreigners in the waters bordering on the establishments of that Company upon the north-west coasts of America.

"I am directed by the President of the United States to inform you that he has seen with surprise in this Edict the assertion of a territorial claim on the part of Russia extending to the 51st degree of north latitude on this continent, and a Regulation interdicting to all commercial vessels other than Russian upon the penalty of seizure and confiscation the approach upon the high seas within 100 Italian miles of the shores to which that claim is made to apply. The relations of the United States with His Imperial Majesty have always been of the most friendly character, and it is the most earnest desire of this Government to preserve them in that state. It was expected, before any Act which would define the boundary between the territories of the United States and Russia on this continent, that the same would have been arranged by Treaty between the parties. To exclude the vessels of our citizens from the shore, beyond the ordinary distance to

which the territorial jurisdiction extends, has excited still greater surprise.

"This Ordinance affects so deeply the right of the United States and of their citizens, that I am instructed to inquire whether you are authorized to give explanations of the grounds of right, upon principles generally recognized by the laws and usages of nations, which can warrant the claims and Regulations contained in it.

"I avail, &c.

(Signed) "JOHN QUINCY ADAMS."

The protest contained in this despatch covers exactly the description in the Regulations under the Edict. Both the Regulations and the protest apply to the waters now known as the Behring Sea.

Russian defence of Ukase.

The Russian Representative replied at length, defending the territorial claim on grounds of discovery, first occupation, and undisturbed possession, and explaining the motive "which determined the Imperial Government to prohibit foreign vessels from approaching the north-west coast of America belonging to Russia, within the distance of at least 100 Italian miles."

"This measure," he said, "however severe it may at first view appear, is after all but a measure of prevention." He went on to say that it was adopted in order to put a stop to an illicit trade in arms and ammunition with the natives against which the Russian Government had frequently remonstrated; and further on he observed:—

"I ought, in the last place, to request you to consider, Sir, that the Russian possessions in the Pacific Ocean extend, on the north-west coast of America, from Bering Strait to the 51st degree of north latitude, and on the opposite side of Asia and the islands adjacent from the same strait to the 45th degree; the extent of sea of which these possessions form the limits comprehends all the conditions which are ordinarily attached to shut seas ("mers fermées"), and the Russian Government might, consequently, judge itself authorized to exercise upon this sea the right of sovereignty, and especially that of entirely interdicting the entrance of foreigners. But it preferred only asserting its essential rights, without taking any advantage of localities."

To this Mr. Adams replied (30th March, 1822). He said:—

For the letter of March 30, 1822, see Appendix.

"This pretension is to be considered not only with reference to the question of territorial right, but also to that prohibition to the vessels of other nations, including those of the United States, to approach within 100 Italian miles of the coasts. From the period of the existence of

the United States as an independent nation their vessels have freely navigated those seas, and the right to navigate them is a part of that independence.

"With regard to the suggestion that the Russian Government might have justified the exercise of sovereignty over the Pacific Ocean as a close sea, because it claims territory both on its American and Asiatic shores, it may suffice to say that the distance from shore to shore on this sea, in latitude 51° north, is not less than 90° of longitude, or 4,000 miles."

The Russian Representative replied to this note, endeavouring to prove that the territorial rights of Russia on the north-west coast of America were not confined to the limits of the Concession granted to the Russian-American Company in 1799, and arguing that the great extent of the Pacific Ocean at the 51st degree of latitude did not invalidate the right which Russia might have to consider that part of the ocean as closed. But he added that further discussion of this point was unnecessary, as the Imperial Government had not thought fit to take advantage of that right.

Mr. Rush thus dealt with the claim:—

Mr. Rush to Mr. Adams; American State Papers, Foreign Relations, vol. v, p. 542.

"The extension of territorial rights to the distance of 100 miles from the coasts upon two opposite continents, and the prohibition of approaching to the same distance from these coasts, or those of all the intervening islands, are innovations in the law of nations, and measures unexampled. It must thus be imagined that this prohibition, bearing the pains of confiscation, applies to a long line of coasts, with the intermediate islands, situated in vast seas, where the navigation is subject to innumerable and unknown difficulties, and where the chief employment, which is the whale fishery, cannot be compatible with a regulated and well-determined course.

"The right cannot be denied of shutting a port, a sea, or even an entire country, against foreign commerce in some particular cases. But the exercise of such a right, unless in the case of a colonial system already established, or for some other special object, would be exposed to an unfavourable interpretation, as being contrary to the liberal spirit of modern times, wherein we look for the bonds of amity and of reciprocal commerce among all nations being more closely cemented.

(See Vattel, B.I., Chapter 23, section 289.)

"Universal usage, which has obtained the force of law, has established for all the coasts an accessory limit of a moderate distance, which is sufficient for the security of the country, and for the convenience of its inhabitants, but which lays no restraint upon the universal rights of nations, nor upon the freedom of commerce and of navigation."

(For part of a Confidential Memorial upon the claim prepared by Mr. Middleton, United States' Minister at St. Petersburgh, see Appendix.)

The claim of Russia attracted much attention

at the time. Mr. Madison wrote to President Monroe:—

"The Convention with Russia is a propitious event, as substituting amicable adjustment for the risk of hostile collision. But I give the Emperor little credit, however, for his assent to the principle of '*mare liberum*' in the North Pacific. His pretensions were so absurd and so disgusting to the maritime world, that he could not do better than retreat from them through the form of negotiation. It is well that the cautious, if not courteous, policy of England towards Russia has had the effect of making us, in the public eye, the leading Power in arresting her expansive ambition."

Ukase, 1821, abandoned.

Mr. Middleton (19th September, 1823), writing Mr. Adams, said:—

See as to suspension of Ukase and restriction to one marine league; Count Nesselrode to Count Lieven, June 26, 1823.

"Upon Sir Charles (Bagot) expressing his wish to be informed respecting the actual state of the north-west question between the United States and Russia so far as it might be known to me, I saw no objection to making a confidential communication to him of the note of Count Nesselrode, dated the 1st August, 1822, by which, in fact, staying the execution of the Ukase above mentioned, Russia has virtually abandoned the pretension therein advanced."

The claim was therefore abandoned before the slightest "exercise" of it had occurred.

The protest of the British Government.

The Ukase was brought to the notice of Lord Londonderry (better known as Lord Castlereagh), the 12th November, 1821, by Baron de Nicolai, then Russian Chargé d'Affaires, as connected with the territorial rights of the Russian Crown on the north-west coast of America, and with the commerce and navigation of the Emperor's subjects in the seas adjacent thereto.

On the 18th January, 1822, four months after the issue of the Ukase, Lord Londonderry, then British Foreign Secretary, wrote in the following terms to Count Lieven, the Russian Ambassador in London:—

"Upon the subject of this Ukase generally, and especially upon the two main principles of claim laid down therein, viz., an exclusive sovereignty alleged to belong to Russia over the territories therein described, as also the exclusive right of navigating and trading within the maritime limits therein set forth, His Britannic Majesty must be understood as hereby reserving all his rights, not being prepared to admit that the intercourse which is allowed on the face of this instrument to have hitherto subsisted on those coasts and in those seas can be deemed to be illicit; or that the ships of friendly Powers, even supposing an unqualified sovereignty was proved to appertain to the imperial Crown in these vast and very imperfectly

occupied territories, could, by the acknowledged law of nations, be excluded from navigating within the distance of 100 Italian miles, as therein laid down, from the coast.

* * * *

"In the meantime, upon the subject of this Ukase generally, and especially upon the two main principles of claim laid down therein, viz., an *exclusive sovereignty* alleged to belong to Russia over the territories therein described, as also the *exclusive right of navigating and trading within the limits therein set forth.* His Britannic Majesty must be understood as *hereby reserving all his rights,* not being prepared to admit that the intercourse which is allowed on the face of this instrument to have hitherto subsisted on those coasts and in those seas can be deemed to be illicit; or *that the ships of friendly Powers,* even supposing an unqualified sovereignty was proved to appertain to the Imperial Crown, in these vast and very imperfectly occupied territories, *could, by the acknowledged law of nations, be excluded from navigating within the distance of* 100 *Italian miles, as therein laid down from the coast,* the exclusive dominion of which is assumed (but as His Majesty's Government conceive in error) to belong to His Imperial Majesty the Emperor of All the Russias."

On the 17th October in the same year, the Duke of Wellington, Ambassador at Verona, addressed to Count Nesselrode a note containing the following words:—

"Objecting, as we do, to this claim of exclusive sovereignty on the part of Russia, I might save myself the trouble of discussing the particular mode of its exercise as set forth in this Ukase. But we object to the sovereignty proposed to be exercised under this Ukase not less than we do to the claim of it. *We cannot admit the right of any Power possessing the sovereignty of a country to exclude the vessels of others from the seas on its coasts to the distance of* 100 *Italian miles.*"

Again, on the 28th November, 1822, the Duke of Wellington addressed a note to Count Lieven, containing the following words:—

"The second ground on which we object to the Ukase is that His Imperial Majesty thereby excludes from a certain considerable extent of the open sea vessels of other nations. We contend that the assumption of this power is contrary to the law of nations, and we cannot found a negotiation upon a paper in which it is again broadly asserted. We contend that no Power whatever can exclude another from the use of the open sea; a Power can exclude itself from the navigation of a certain coast, sea, &c., by its own act or engagement, but it cannot by right be excluded by another. This we consider as the law of nations, and we cannot negotiate upon a paper in which a right is asserted inconsistent with this principle.

". . . . The questions at issue between Great Britain and Russia are short and simple. The Russian Ukase contains two objectionable pretensions: First, an extravagant assumption of maritime supremacy; secondly, an unwarranted claim of territorial dominions.

"As to the first, the disavowal of Russia is in substance all that we could desire. Nothing remains for negotiation on that head but to clothe that disavowal in precise and satisfactory terms. We would much rather that those terms should be suggested by Russia herself than have the air of pretending to dictate them; you will therefore request Count Nesselrode to furnish you with his notion of such declaration on this point as may be satisfactory to your Government. That declaration may be made the preamble of the convention of limits. . . . .

* * * * *

". . . . Your Excellency will observe that there are but two points which have struck Count Lieven as susceptible of any question: the first, the assumption of the base of the mountains, instead of the summit, as the line of boundary; the second, the extension of the right of the navigation of the Pacific to the sea beyond Behring Straits.

* * * * *

"As to the second point, it is, perhaps, as Count Lieven remarks, new. But it is to be remarked in return that the circumstances under which this additional security is required will be new also.

"By the territorial demarcation agreed to in this 'projet,' Russia will become possessed in acknowledged sovereignty of both sides of Bering Straits.

"The Power which would think of making the Pacific a *mare clausum* may not unnaturally be supposed capable of a disposition to apply the same character to a strait comprehended between two shores, of which it becomes the undisputed owner. But the shutting up of Bering Straits, or the power to shut them up hereafter, would be a thing not to be tolerated by England.

"Nor could we submit to be excluded, either positively or constructively, from a sea in which the skill and science of our seamen has been and is still employed in enterprises interesting not to this country alone, but to the whole civilized world.

"The protection given by the Convention to the American coasts of each Power may (if it is thought necessary) be extended in terms to the coasts of the Russian Asiatic territory; but, in some way or other, if not in the form now prescribed, the free navigation of Bering Straits and of the seas beyond them must be secured to us."

Mr. G. Canning wrote to the Duke of Wellington on the 27th September, 1822. He also dealt in this despatch with the claim in the Ukase for the extension of territorial rights over adjacent seas to the distance—"unprecedented distance,"

he terms it—of 100 miles from the coast, and of closing "a hitherto unobstructed passage."

In this despatch Mr. Canning says:—

Abandonment of claim to extraordinary jurisdiction.

"I have, indeed, the satisfaction to believe, from a conference which I have had with Count Lieven on this matter, that upon these two points—the attempt to shut up the passage altogether, and the claim of exclusive dominion to so enormous a distance from the coast—the Russian Government are prepared entirely to waive their pretensions. The only effort that has been made to justify the latter claim was by reference to an Article in the Treaty of Utrecht, which assigns 30 leagues from the coast as the distance of prohibition. But to this argument it is sufficient to answer that the assumption of such a space was, in the instance quoted, by stipulation in a Treaty, and one to which, therefore, the party to be affected by it had (whether wisely or not) given its deliberate consent. No inference could be drawn from that transaction in favour of a claim by authority against all the world.

"I have little doubt, therefore, but that the public notification of the claim to consider the portions of the ocean included between the adjoining coasts of America and the Russian Empire as a *mare clausum*, and to extend the exclusive territorial jurisdiction of Russia to 100 Italian miles from the coast, will be publicly recalled; and I have the King's commands to instruct your Grace further to require of the Russian Minister (on the ground of the facts and reasonings furnished in this despatch and its inclosures) that such a portion of territory alone shall be defined as belonging to Russia as shall not interfere with the rights and actual possessions of His Majesty's subjects in North America."

There was, as has been said, no exercise of extraordinary exclusive jurisdiction on the part of Russia. The pretensions set up in the Ukase of 1821 were undoubtedly promptly suspended.

Writing to Mr. S. Canning in 1824 (8th December), the Right Honourable G. Canning remarks:—

As to suspension of Ukase, see Lyall to Canning, Conyngham to Lyall, November 1823, Appendix.

"That this Ukase is not acted upon, and that instructions have long ago been sent by the Russian Government to their cruizers in the Pacific to suspend the execution of its provisions is true."

Mr. Canning to Sir C. Bagot, the 20th January, 1824:—

P. 529, C. 6131.

"The questions at issue between Great Britain and Russia are short and simple. The Russian Ukase contains two objectionable pretensions: first, an extravagant assumption of maritime supremacy; secondly, an unwarranted claim of territorial dominion.

"As to the first, the disavowal of Russia is, in substance, all that we could desire. Nothing remains for negotiation on that head but to clothe that disavowal in precise and

satisfactory terms. We would much rather that those terms should be suggested by Russia herself than have the air of pretending to dictate them. You will, therefore, request Count Nesselrode to furnish you with his notion of such a Declaration on this point as may be satisfactory to your Government. That Declaration may be made the preamble of the Convention of Limits."

The Treaty (Russia and the United States). For text of Treaty, see Appendix. April 17, 1824.

The Convention between the United States and Russia of the 17th April, 1824, put an end to any further pretension on the part of Russia to restrict navigation or fishing in Bering Sea, so far as American citizens were concerned; for by Article I it was agreed that in any part of the Great Ocean, commonly called the Pacific Ocean or South Sea, the respective citizens or subjects of the High Contracting Powers shall neither be disturbed nor restrained, either in navigation or fishing, saving certain restrictions which are not material to the present issue.

Articles I and IV of the United States-Russia Treaty are as follows:—

"ARTICLE I.

"It is agreed that in any part of the Great Ocean, commonly called the Pacific Ocean or South Sea, the respective citizens or subjects of the High Contracting Powers shall be neither disturbed nor restrained, either in navigation or in fishing, or in the power of resorting to the coasts upon points which may not already have been occupied for the purpose of trading with the natives, saving always the restrictions and conditions determined by the following Articles.

"ARTICLE IV.

"It is, nevertheless, understood, that during a term of ten years, counting from the signature of the present Convention, the ships of both Powers, or which belong to their citizens or subjects respectively, may reciprocally frequent, without any hindrance whatever, the interior seas, gulfs, harbours, and creeks upon the coast mentioned in the preceding Article, for the purpose of fishing and trading with the natives of the country." (State Papers, vol. xii, p. 595.)

United States' interpretation of Russo-American Treaty.

In reference to this Convention of 1824, Wharton, in his "Digest of the International Law of the United States of America," section 159, vol. ii, p. 226, cites President Monroe's communication to Mr. Madison on the 2nd August, 1824, to the effect that "by this Convention the claim of *mare clausum* is given up; a very high northern latitude is established for the boundary with Russia, and our trade with the Indians

placed for ten years on a perfectly free footing, and after that term left open for negotiation. . . . England will, of course, have a similar stipulation in favour of the free navigation of the Pacific, but we shall have the credit of having taken the lead in the affair."

It has already been seen that, at the time the Convention of 1824 was agreed upon, the United States' Government expressly declared (1) that, by entering into this Treaty, they did not intend to surrender their privilege under the law of nations; (2) that there was no ground for alleging an abandonment to Russia of their rights beyond 54° 40′ as to the coast.

Mr. Forsyth, Secretary of State for the United States, writing to Mr. Dallas on the 3rd November, 1837, and referring to the Ist Article of the Convention of April 1824 between the United States and Russia, said :—

"The Ist Article of that instrument is only declaratory of a right which the parties to it possessed under the law of nations without conventional stipulations, to wit: to navigate and fish in the ocean upon an unoccupied coast, and to resort to such coast for the purpose of trading with the natives.

"It is a violation of the right of the citizens of the United States, immemorially exercised and secured to them, as well by the law of nations as by the stipulations of the Ist Article of the Convention of 1824, to fish in those seas and to resort to the coast for the prosecution of their lawful commerce upon points not already occupied.

"The United States, in agreeing not to form new establishments to the north of latitude of 54° 40′ N., made no acknowledgment of the right of Russia to the territory above that line." (Mr. Forsyth to Mr. Dallas, 3rd November, 1837.)

And, again :—

"It cannot follow that the United States ever intended to abandon the just right acknowledged by the Ist Article to belong to them under the law of nations—to *frequent any part* of the *unoccupied coast of North America* for the purpose of fishing or trading with the natives. All that the Convention admits is an inference of the right of Russia to acquire possession, by settlement, north of 54° 40′ N. Until that actual possession is taken, the Ist Article of the Convention acknowledges the right of the United States to fish and trade as prior to its negotiation."

In his despatch of the 23rd February, 1838, Count Nesselrode said :—

"It is true, indeed, that the Ist Article of the Conven-

tion of 1824, to which the proprietors of the 'Loriot' appeal, secures to the citizens of the United States entire liberty of navigation in the Pacific Ocean, as well as the right of landing without disturbance upon *all points on the north-west coast of America* not already occupied, and to trade with the natives."

Mr. Dallas (16th August, 1837), when representing the United States at St. Petersburgh, wrote to the Secretary of State:—

"The Ist Article asserts for both countries general and permanent rights of navigation, fishing and trading with the natives, upon points not occupied by either, *north or south of the agreed parallel of latitude.*"

In 1838, Mr. Dallas, in a despatch to Count Nesselrode, interpreted Article I of the Convention as being applicable to *any part of the Pacific Ocean.*

Mr. Dallas, in this despatch of the 5th (17th) March, 1838, to Count Nesselrode, said:—

". . . . The right of the citizens of the United States to navigate the Pacific Ocean, and their right to trade with the aboriginal natives of the north-west coast of America, without the jurisdiction of other nations, are rights which constituted a part of their independence as soon as they declared it. They are rights founded in the law of nations, enjoyed in common with all other independent sovereignties, and incapable of being abridged or extinguished except with their own consent. It is unknown to the Undersigned that they have voluntarily conceded these rights, or either of them, at any time, through the agency of their Government, by Treaty or other form of obligation, in favour of any community.

* * * *

"There is, first, a mutual and permanent Agreement declaratory of their respective rights, without disturbance or restraint, to navigate and fish in any part of the Pacific Ocean, and to resort to its coasts upon points which may not already have been occupied, in order to trade with the natives. These rights pre-existed in each, and were not fresh liberties resulting from the stipulation. To navigate, to fish, and to coast, as described, were rights of equal certainty, springing from the same source and attached to the same quality of nationality. Their exercise, however, was subjected to certain restrictions and conditions, to the effect that the citizens and subjects of the contracting sovereignties should not resort to points where establishments existed without obtaining permission; that no future establishments should be formed by one party north, nor by the other party south, of 54° 40' north latitude; but that, nevertheless, both might, for a term of ten years, without regard to whether an establishment existed or not, without obtaining permission, without any hindrance whatever, frequent the interior seas, gulfs, harbours, and

creeks, to fish and trade with the natives. This short analysis leaves, on the question at issue, no room for construction.

* * * *

"The Undersigned submits that in no sense can the IVth Article be understood as implying an acknowledgment on the part of the United States of the right of Russia to the possession of the coast above the latitude of 54° 40′ north."

The Treaty (Great Britain and Russia), February 28, 1825.

The Convention between Great Britain and Ireland and Russia was signed on the 18th February, 1825.

The following are some of the important clauses:—

"I. It is agreed that the respective subjects of the High Contracting Parties shall not be troubled or molested in any part of the ocean, commonly called the Pacific Ocean, either in navigating the same or fishing therein, or in landing at such parts of the coast as shall not have been already occupied, in order to trade with the natives, under the restrictions and conditions specified in the following Articles:

"II. In order to prevent the right of navigating and fishing, exercised upon the ocean by the subjects of the High Contracting Parties, from becoming the pretext for an illicit commerce, it is agreed that the subjects of His Britannic Majesty shall not land at any place where there may be a Russian establishment without the permission of the Governor or Commandant; and, on the other hand, that Russian subjects shall not land, without permission, at any British establishment on the north-west coast.

"III. The line of demarcation between the possessions of the High Contracting Parties, upon the coast of the continent, and the islands of America to the north-west, shall be drawn in the manner following:

"Commencing from the southernmost part of the island called Prince of Wales' Island, which point lies in the parallel of 54° 40′ north latitude, and between the 131st and the 133rd degree of west longitude (meridian of Greenwich), the said line shall ascend to the north along the channel called Portland Channel, as far as the point of the continent where it strikes the 56th degree of north latitude; from this last-mentioned point, the line of demarcation shall follow the summit of the mountains situated parallel to the coast, as far as the point of intersection of the 141st degree of west longitude (of the same meridian); and, finally, from the said point of intersection and the said meridian-line of the 141st degree, in its prolongation as far as the Frozen Ocean, shall form the limit between the Russian and British possessions on the continent of America to the north-west.

"IV. With reference to the line of demarcation laid down in the preceding Article, it is understood—

"First. That the island called Prince of Wales' Island shall belong wholly to Russia.

"Secondly. That wherever the summit of the mountains which extend in a direction parallel to the coast, from the 56th degree of north latitude to the point of intersection of the 141st degree of west longitude, shall prove to be at the distance of more than 10 marine leagues from the ocean, the limit between the British possessions and the line of coast which is to belong to Russia, as above mentioned, shall be formed by a line parallel to the windings of the coast, and which shall never exceed the distance of 10 marine leagues therefrom.

"V. It is moreover agreed, that no establishment shall be formed by either of the two parties within the limits assigned by the two preceding Articles to the possession of the other; consequently, British subjects shall not form any establishment either upon the coast or upon the border of the continent comprised within the limits of the Russian possessions, as designated in the two preceding Articles; and, in like manner, no establishment shall be formed by Russian subjects beyond the said limits.

"VI. It is understood that the subjects of His Britannic Majesty, from whatever quarter they may arrive, whether from the ocean or from the interior of the continent, shall for ever enjoy the right of navigating freely, and without any hindrance whatever, all the rivers and streams which, in their course towards the Pacific Ocean, may cross the line of demarcation upon the line of coast described in Article III of the present Convention.

"VII. It is also understood that, for the space of ten years from the signature of the present Convention, the vessels of the two Powers, or those belonging to their respective subjects, shall mutually be at liberty to frequent, without any hindrance whatever, all the inland seas, the gulfs, havens, and creeks on the coast mentioned in Article III. for the purposes of fishing and of trading with the natives."

Mr. George Canning in a despatch to Mr. Stratford Canning, when the latter was named Plenipotentiary to negotiate the Treaty of 1825, under date the 8th December, 1824, after giving a summary of the negotiations up to that date, goes on to say :—

For despatch in full, see Appendix.

"It is comparatively indifferent to us whether we hasten or postpone all questions respecting the limits of territorial possession on the continent of America, but the pretensions of the Russian Ukase of 1821 to exclusive dominion over the Pacific could not continue longer unrepealed without compelling us to take some measure of public and effectual remonstrance against it.

"You will, therefore, take care, in the first instance, to repress any attempt to give this change to the character of the negotiation, and will declare, without reserve, that the point to which alone the solicitude of the British Government and the jealousy of the British nation attach any great importance is the doing away (in a manner as

little disagreeable to Russia as possible) of the effect of the Ukase of 1821.

* * * *

"The right of the subjects of His Majesty to navigate freely in the Pacific cannot be held as a matter of indulgence from any Power. Having once been publicly questioned, it must be publicly acknowledged.

"We do not desire that any distinct reference should be made to the Ukase of 1821, but we do feel it necessary that the statement of our right should be clear and positive, and that it should stand forth in the Convention in the place which properly belongs to it as a plain and substantive stipulation, and not be brought in as an incidental consequence of other arrangements to which we attach comparatively little importance.

"This stipulation stands in the grant of the Convention concluded between Russia and the United States of America, and we see no reason why, upon similar claims, we should not obtain exactly the like satisfaction.

"For reasons of the same nature, we cannot consent that the liberty of navigation through Bering Straits should be stated in the Treaty as a boon from Russia.

"The tendency of such a statement would be to give countenance to those claims of exclusive jurisdiction against which we, on our own behalf and on behalf of the whole civilized world, protest.

* * * *

"It will, of course, strike the Russian Plenipotentiaries that, by the adoption of the American Article respecting navigation, &c., the provision for an excessive fishery of 2 leagues from the coasts of our respective possessions falls to the ground.

"But the omission is, in truth, immaterial.

"The law of nations assigns the exclusive sovereignty of 1 league to each Power off its own coasts, without any specified stipulation; and though Sir Charles Bagot was authorized to sign the Convention with the specific stipulation of 2 leagues, in ignorance of what had been decided in the American Convention at the time, yet, after that Convention has been some months before the world, and after the opportunity of reconsideration has been forced upon us by the act of Russia herself, we cannot now consent, in negotiating *de novo*, to a stipulation which, while it is absolutely unimportant to any practical good, would appear to establish a contract between the United States and us to our disadvantage."

Mr. Stratford Canning, in his despatch of the 1st March, 1825, inclosing the Convention as signed, says:—

"With respect to Bering Straits, I am happy to have it in my power to assure you, on the joint authority of the Russian Plenipotentiaries, that the Emperor of All the Russias has no intention whatever of maintaining any exclusive claim to the navigation of these straits, or of the seas to the north of them."

These extracts show conclusively—

1. That England refused to admit any part of the Russian claim asserted by the Ukase of 1821 to a maritime jurisdiction and exclusive right of fishing throughout the whole extent of that claim, from Bering Straits to the 51st parallel;

2. That the Convention of 1825 was regarded on both sides as a renunciation on the part of Russia of that claim in its entirety; and

3. That though Bering Straits was known and specifically provided for, Bering Sea was not generally known by that name, but was regarded as part of the Pacific Ocean.

On the 3rd (15th) April, 1825, Mr. Canning reported that Count Nesselrode assured him that in executing the Convention, so far as matters omitted went, Russia would be content to abide by the recognized law of nations.

Mr. Canning, in a despatch to Mr. S. Canning (8th December, 1824), said:—

"It will, of course, strike the Russian Plenipotentiaries that by the adoption of the American Article respecting navigation, &c., the provision of an exclusive fishery of 2 leagues off the coast of our respective possessions falls to the ground. But the omission is in truth immaterial. The *law of nations* assigns the exclusive sovereignty of 1 *league* to each Power off its own coasts."

Mr. Canning, writing to the Right Honourable G. Canning, 3rd (15th) April, 1825, said:—

". . . With respect to the right of fishing, no explanation whatever took place between the Plenipotentiaries and myself in the course of our negotiations. As no objection was started by them to the Article which I offered in obedience to your instructions, I thought it inadvisable to raise a discussion on the question, and the distance from the coast at which the right of fishing is to be exercised in common passed without specification, and consequently rests on the law of nations as generally received.

"Conceiving, however, at a later period, that you might possibly wish to declare the law of nations thereon jointly with the Court of Russia in some ostensible shape, I broached the matter anew to Count Nesselrode, and suggested that he should authorize Count Lieven, on your invitation, to exchange notes with you declaratory of the law as fixing the distance at 1 marine league from the shore. Count Nesselrode replied that he should feel embarrassed in submitting this suggestion to the Emperor just at the moment when the ratifications of the Convention were on the point of being dispatched to London, and he seemed exceedingly desirous that nothing should happen to retard the accomplishment of that essential

formality. He assured me at the same time that his Government would be content, in executing the Convention, to abide by the recognized law of nations, and that if any question should hereafter be raised upon the subject, he should not refuse to join in making the suggested declaration on being satisfied that the general rule under the law of nations was such as we supposed.

"Having no authority to press the point in question, I took the assurance thus given by Count Nesselrode as sufficient in all probability to answer every national purpose. . . ."

Seal Fisheries and the Treaties.

There is no reference in the Ukase of Paul, the Ukase of Alexander, the Convention of 1824, the Convention of 1825, or in the correspondence touching those documents and the incidents connected therewith which directly refers to the seal fisheries, or to special rights therein.

Whatever exclusive jurisdiction either in Bering Sea, or in the seal fisheries thereof, was claimed by Russia, is covered by the language of the Ukase of Alexander, or was never set up.

After the protests from Great Britain and the United States against the entire claim set up in the Ukase any special control of the fur trade could have been retained only by special reservation in the Conventions which followed. The pursuits of whaling and fishing, the fur trade and commerce mentioned in the Ukase, are in the same category. The Ukase certainly stood or fell in its entirety as regards these interests in Bering Sea. Bancroft informs us that, as regards whaling and the Ukase, an unmistakable decision was given on the part of Russia in 1842. Etholen, a Russian Governor, had complained of the presence of American whalers in Behring Sea, and had asked his Government to hold the sea as a *mare clausum*. The Russian Government promptly replied that the Treaty (between Russia and the United States) gave to American citizens the *right to engage in fishing over the whole extent of the Pacific Ocean*. (Bancroft, Alaska, p. 583.) The whalers were not molested.

It has been shown that the claims to exclusive jurisdiction or control of the fisheries or of navigation put forward by the Ukase from Bering Sea south were neither recognized nor conceded by any Power.

The objection and protest by Great Britain and the United States of America were as wide as the claim.

"Assertion" of rights not insisted upon.
Dall's "Alaska," pp. 333, 334.

There is no instance of any action on the part of Russia which contemplated an "assertion" of the jurisdiction claimed except in the case of the brig "Pearl," of the United States of America.

This vessel was arrested in 1822. She was seized by Russia when on a voyage from Boston to Sitka, but in 1824 was released, Russia paying compensation for her arrest and detention.

After the Convention with the United States of America and with Great Britain, no attempt was made on the part of Russia to revive the claim of exclusive or extraordinary jurisdiction over any part of Bering Sea.

On the contrary, Russian authorities considered her jurisdiction to be, by the law of nations, confined in Bering Sea and all other parts of the Pacific Ocean to within the 3 miles from the coasts, and Russia so acted.

Interpretation of Treaty by Russia.
Extract from "Tikhmenieff," pp. 24, 25. Appendix.

Accordingly, in a letter from the Department of Manufactures and Internal Trade to the Governor of the Russian-American Company of the 14th December, 1842, in reply to his complaint as to proceedings of American whalers in Bering Sea, the following passage occurs:—

"The claim to a *mare clausum*, if we wished to advance such a claim in respect to the northern part of the Pacific Ocean, could not be theoretically justified. Under Article I of the Convention of 1824 between Russia and the United States, which is still in force, American citizens have a right to fish in all parts of the Pacific Ocean. But under Article IV of the same Convention, the ten years' period mentioned in that Article having expired, we have power to forbid American vessels to visit inland seas, gulfs, harbours, and bays for the purposes of fishing and trading with the natives. That is the limit of our rights, and we have no power to prevent American ships from taking whales in the open sea."

Ineffectual attempt of Russian-American Company to stop fur-traffic and whaling.

The whalers, from 1843 to 1850, landed on the Aleutian and Kurile Islands, committing depredations. American captains openly carried on a traffic in furs with the natives.

The Russian-American Company became alarmed at the danger to their fur trade.

Every effort was, therefore, put forward by the Company and the Governors to induce the Foreign Office of the Russian Government to drive off these whalers from the coasts, and by excluding them for a great distance from shore prevent the trespasser on shore and the traffic in furs.

"Tikhmenieff" thus describes the result of these representations:—

"The exact words of the letter from the Foreign Office are as follows:—

"'The fixing of a line at sea within which foreign vessels should be prohibited from whaling off our shores would not be in accordance with the spirit of the Convention of 1824, and would be contrary to the provisions of our Convention of 1825 with Great Britain. Moreover, the adoption of such a measure, without preliminary negotiation and arrangement with the other Powers, might lead to protests, since no clear and uniform agreement has yet been arrived at among nations in regard to the limit of jurisdiction at sea.'

"In 1847 a representation from Governor Tebenkoff in regard to new aggressions on the part of the whalers gave rise to further correspondence. Some time before,—in June 1846, the Governor-General of Eastern Siberia had expressed his opinion that, in order to limit the whaling operations of foreigners, it would be fair to forbid them to come within 40 Italian miles of our shores, the ports of Petropaulovsk and Okhotsk to be excluded, and a payment of 100 silver roubles to be demanded at those ports from every vessel for the right of whaling. He recommended that a ship of war should be employed as a cruizer to watch foreign vessels. The Foreign Office expressly stated as follows, in reply:—

"'We have no right to exclude foreign ships from that part of the great ocean which separates the eastern shore of Siberia from the north-western shore of America, or to make the payment of a sum of money a condition to allowing them to take whales.'

"The Foreign Office were of opinion that the fixing of the line referred to above would reopen the discussions formerly carried on between England and France on the subject. The limit of a cannon-shot, that is, about 3 Italian miles, would alone give rise to no dispute. The Foreign Office observed, in conclusion, that no Power had yet succeeded in limiting the freedom of fishing in open seas, and that such pretensions had never been recognized by the other Powers. They were confident that the fitting out of colonial cruizers would put an end to all difficulties; there had not yet been time to test the efficacy of this measure."

Whalers shortly after this began to turn their attention to the Sea of Okhotsk.

The main objection to these whalers was because of their interference with and injury to the fur industry, yet the instructions to Russian cruizers only prohibit these vessels from coming "within 3 Italian miles of our shores, that is, the shores of Russian America (north of 54° 41'), the Peninsula of Kamschatka, Siberia, the Kadjak Archipelago, the Aleutian Islands, the Pribyloff

For extract from "Tikhmenieff," see Appendix.

and Commander Islands, and the others in Bering Sea."

The Sea of Okhotsk is within the terms of the Ukase of 1821, and possesses a seal rookery (Robben Island).

An examination of the Map will show that the Sea of Okhotsk has many more characteristics of an inclosed inland sea than the Bering Sea.

It is almost surrounded by Russian territory.

The mouth of this sea is barred by a string of islands and reefs, some of them being as far apart as Attu and Copper Island in Bering Sea.

Whalers not infrequently took seals, as appears from the following evidence before the Committee of Ways and Means in the House of Representatives at Washington (3rd May, 1876):—

"*Q.* Who are Williams, Haven, and Co.?—*A.* Williams, Haven, and Co. are Mr. Henry P. Haven, of Connecticut, who died last Sunday, and Richard Chapel. They are whalers. They took seals and whales, and had been at that business in the Pacific for a great many years.

"*Q.* They had an interest in these skins?—*A.* Yes, Sir. They had a vessel in the waters of the Okhotsk Sea, I think, seal-fishing in 1866. While their vessel was at Honolulu in 1866, the captain became acquainted with a Russian captain who put in there in distress with the remainder, or a portion, of the Alaska seal-skins taken by the old Russian Company, and there this captain learned of this interest. He left his vessel at Honolulu, went to Connecticut, and conferred with his employers. Then Mr. Chapel, one of the concern, went out to Honolulu and fitted out this vessel and another one, and sent them to the Alaska Islands as early as April 1868." 44th Cong., 1st Sess., Report 623.

Appendix.

The firm of Messrs. Lynde and Hough, who were engaged in the Pacific coast fisheries, yearly sent vessels to the Sea of Okhotsk, fishing from 10 to 20 miles from shore. They became alarmed at a notice apparently excluding them from the Sea of Okhotsk and the Bering Sea.

The Secretary of State (Mr. Frelinghuysen) inclosed a letter from Messrs. Lynde and Hough, together with the regulations "touching the Pacific coast fisheries," as he termed them, to the American Minister at St. Petersburgh.

Mr. Hoffman, the American Minister, acknowledged the receipt of this despatch, in reference to what he also called "Our Pacific Ocean fisheries."

In the replies of M. de Giers to Mr. Hoffman,

he explained that these regulations apply only to territorial waters, and that the maritime waters were, by the Code, open to the use "of one and all."

In 1867 the "Europa," a United States' whaling vessel, complained that she was driven from the Sea of Okhotsk. Mr. Seward immediately authorized the American Minister at St. Petersburgh, Mr. Clay, to make inquiries. The Russian Government explained that the vessel had not been interfered with, and went on to observe that the right of fishing was reserved to Russians only within the distance of 3 miles from shore.

Mr. Seward then expressed himself as satisfied.

So, moreover, when the "Eliza" and "Henrietta" were interfered with — the "Eliza," in 1884, for hunting walrus on the coast of Kamschatka and trading with the natives, the "Henrietta," in 1886, for fishing and trading off East Cape and Bering Strait—Mr. Bayard, Secretary of State, in writing to Mr. Lothrop, the American Minister to Russia, claimed a right to redress if it should appear that, "While the seizure was within the 3-mile zone, the alleged offence was committed exterior to that zone and on the high seas." In the case of the "Henrietta," Mr. Bayard wrote the United States' Minister at St. Petersburgh as follows:—

United States' Papers relating to Bering Sea.

Fisheries, Washington, 1887, p 121.

"*Department of State,*

"Sir, "*Washington, March* 16, 1887.

"I have received your No. 95 of the 17th ultimo, in answer to instruction No. 65, concerning the grounds for seizure and confiscation on the 24th August, 1886, of the American schooner 'Henrietta' by the Russian authorities.

'If, as I am to conclude from your despatch, the seizure of the 'Henrietta' was made in Russian territorial waters, then the Russian authorities had jurisdiction, and if the condemnation was on proceedings duly instituted and administered before a competent Court, and on adequate evidence, this Department has no right to complain; but, if either of these conditions does not exist, the condemnation cannot be internationally sustained. The first of these conditions, viz. that the proceedings should have been duly instituted and administered, could not be held to exist if it should appear that the Court before whom the proceedings were had was composed of parties interested in the seizure. On general principles of international law, to enforce a condemnation by such a Court is a denial and perversion of justice, for which this Government is entitled to claim redress.

"The same right to redress, also, would arise if it should appear that while the seizure was within the 3-mile zone

the alleged offence was committed exterior to that zone and on the high seas.

"You are, therefore, instructed to inquire, not merely as to the mode in which the condemning Court was constituted, but as to the evidence adduced before such Court in which the exact locality of seizure should be included.

"I am, &c
(Signed) "T. F. BAYARD."

In 1868 (14th August), Mr. Westmann, Acting Russian Minister for Foreign Affairs, writes to Mr. Clay, Secretary of State for the United States of America, showing the extinction of any extraordinary territorial claim:—

Ex. Doc. 106, 50th Cong., 2nd Sess., p. 253.

"Considering that foreign whalers are forbidden by the laws in force to fish in the Russian gulfs and bays at a distance less than 3 miles from the shore, where the right of fishing is exclusively reserved to Russian subjects," &c.

So in 1875, a question arising as to Russia's authority to grant licences for the use of her contiguous seas, Mr. Fish, Secretary of State for the United States of America, said:—

"There was reason to hope that the practice which formerly prevailed with powerful nations of regarding *seas* and bays, *usually of large extent*, near their coast, *as closed to any foreign commerce or fishery* not specially licensed by them, was, without exception, *a pretension of the past*, and that no nation would claim exemption from the general rule of public law which limits its maritime jurisdiction to a marine league from its coast. We should particularly regret if Russia should insist on any such pretension."

So again the notice of the 15th November, 1881, by Russian Consul at Yokohama, as to fishing in Bering Sea, shows that Russia then only claimed jurisdiction over 3 miles of coast.

Ibid., p. 259.

That the Ukase of 1821 was abandoned in the recognition of the existing right in all nations has been universally and uniformly considered by writers of international law from the date of the Conventions until now.

Interpretation of the Convention of 1824 and 1825 by writers on international law.

Wharton, section 32, p. 111:—

Russia having asserted in 1822 to 1824 an exclusive jurisdiction over the north-west coast waters of America from Behring Straits to the 51st degree of north latitude, the claim was protested by the United States and Great Britain, and was compromised in a Convention between Russia and the United States in April 1824 . . . , and in a Convention between Great Britain and Russia in Feb

These Treaties universally accepted until now, as an abandonment of Russia's claim. Wharton, sec. 159, where, also, President Monroe's construction of the Treaty appears.

ruary 1825."—(2 Lyman's "Diplomacy of the United States," chap. 11.)

Davis, p. 44 :—

"Russia, in 1822, laid claim to exclusive jurisdiction over that part of the Pacific Ocean lying north of the 51st degree of north latitude, on the ground that it possessed the shores of that sea on both continents beyond that limit, and so had the right to restrict commerce to the coast inhabitants. England and the United States entered vigorous protests against the right claimed by Russia as contrary to the principles of international law, and it was formally withdrawn in 1824."

Woolsey, 6th edition, section 59, p. 73 :—

"Russia finally, at a more recent date, based an exclusive claim to the Pacific north of the 51st degree, upon the ground that this part of the ocean was a passage to shores lying exclusively within her jurisdiction ; but this claim was resisted by our Government, and withdrawn in the temporary Convention of 1824. A Treaty of the same Empire with Great Britain in 1825 contains similar concessions.

"The recent controversy between Great Britain and the United States involving the right of British subjects to catch seals in North Pacific waters appears to be an attempted revival of these old claims to jurisdiction over broad stretches of sea. That an international agreement establishing a rational close season for the fur-seal is wise and necessary no one will dispute, but to prevent foreigners from sealing on the high sea or within the Kamschatkan Sea, which is not even inclosed by American territory, its west and north-west shores being Russian, is as unwarranted as if England should warn fishermen of other nationalities off the Newfoundland banks.

"The right of all nations to the use of the high sea being the same, their rights to fish upon the high seas or on banks or shoal places in them are equal."

Hall, 3rd edition, 1890, p. 147 :—

Note.—A new claim subsequently sprang up [illegible] the Pacific, but it was abandoned in a very short time. The Russian Government pretended to the Sovereignty over the Pacific north of the 51st degree of latitude, and published an Ukase in 1821 prohibiting foreign vessels from approaching within 100 Italian miles of the coasts and islands bordering upon or included in that portion of the ocean. The pretension was resisted by the United States and Great Britain, and was wholly given up by Conventions between the [illegible] and Russia in 1824 and [illegible]. . . . With [illegible] the United States, upon acquiring possession of Alaska, have claimed, as attendant upon it by virtue of [illegible] about two-thirds of the Bering Sea, a space of 1,[illegible] miles long and [illegible] miles wide, and upon the strength of this claim

have seized British vessels engaged in seal-fishing. In at least one case the master and mate of a vessel so taken have been fined and imprisoned; the vessel was seized for fishing at a distance of more than 70 miles from land."

Phillimore, 3rd edition, vol. i, p. 290:—

"The contention, advanced for the first time by the United States in this controversy, after an acquiescence of more than sixty-five years in the world's construction of the Treaties of 1824 and 1825, that the phrase 'Pacific Ocean,' as used in those Treaties, was not intended to include, and did not include, the body of water which is now known as the Bering Sea, because the words 'Bering Sea' were not used in either Treaty, is without any foundation, as will be subsequently shown; and yet the Concession is made by the United States that, 'if Great Britain can maintain her position that the Bering Sea at the time of the Treaties with Russia of 1824 and 1825 was included in the Pacific Ocean, the Government of the United States has no well-grounded complaint against her.'" (Ex. Doc., No. 144, H. R., 51st Congress, 2nd Session, p. 27.)

Question 3:—

Was the body of water now known as the Bering Sea included in the phrase "Pacific Ocean," as used in the Treaty of 1825 *between Great Britain and Russia; and what rights, if any, in the Bering Sea, were held and exclusively exercised by Russia after said Treaty?*

The last portion of this question is covered by Points 1 and 2, and has been already considered.

It has been claimed on the part of the United States that, in the negotiations of 1824-25, Bering Sea was understood by the three Signatory Powers concerned to be "a separate body of water, and was not included in the phrase 'Pacific Ocean;'" and that by long prescription the words "north-west coast" mean the coast of the Pacific Ocean between 60° north latitude and 54° 40′ only.

Mr. Blaine to Sir [illegible] Pauncefote, [illegible] December, 1890.

It has been seen that the whole controversy, which was ended by the Treaty, arose out of the Ukase.

That document claimed not only the territorial right of sovereignty from Bering Straits to 51° north latitude, but the right to exclude foreign vessels from approaching the coasts and islands within 100 Italian miles.

In absence of a specified exception, the withdrawal should be held commensurate with the pretension.

It was protested against *in toto*, on the ground that the coast was almost entirely unoccupied, and that maritime jurisdiction, even where it was occupied, should not extend beyond 3 miles.

The coast of Bering Sea was, moreover, less occupied than the coast outside.

Mr. Adams to Mr. Rush, July 22, 1823.

Mr. Adams, in 1823, dealt with the Russian claim as one of exclusive territorial right on the north-west coast of America, extending, he said, from the "northern extremity of the continent." Articles in the "North American Review" (vol. xv, Article 18), and "Quarterly Review" (1821-22, vol. xxvi, p. 344), published at the time of the negotiations of 1824-25, so treat the words "north-west coast."

American State Papers, Foreign Relations, vol. v, p. 436.

Mr. Adams in his despatch of the 22nd July, 1823, referred to Emperor Paul's Ukase as pretending to grant to the American Company the "exclusive possession of the north-west coast of America, which belonged to Russia, from the 55th degree of *north latitude to Bering Strait.*"

The Ukase was headed "Rules established for the Limits of Navigation and Order of Communication along the coast of the Eastern Siberia, the *north-west-coast of America*, and the Aleutian, Kurile, and other Islands." It obviously included the coast of Bering Sea in the term "north-west coast."

Baron Nicolay to Lord Londonderry, 31st October (12th November), 1821, says:—

"Le nouveau Règlement n'interdit point aux bâtiments étrangers la navigation dans les mers qui baignent les possessions Russes sur les côtes nord-ouest de l'Amérique et nord-ouest de l'Asie."

* * * *

"Car, d'un autre côté en considérant les possessions Russes qui s'étendent, tant sur la côte nord-ouest de l'Amérique, depuis le Détroit de Bering jusqu'au 51° de latitude septentrionale, que sur la côte opposée de l'Asie et les îles adjacentes, depuis le même détroit jusqu'au 45°," &c.

* * * *

"Car, s'il est démontré que le Gouvernement Impérial eut eû à la rigueur la faculté de fermer entièrement aux étrangers cette partie de *l'Océan Pacifique* que bordent nos possessions en Amérique et en Asia, à plus forte raison le droit en vertu auquel il vient d'adopter une mesure beaucoup moins généralement restrictive doit ne pas être révoqué en doute."

* * * *

"Les officiers commandant les bâtiments de guerre Russes qui sont destinés à veiller dans l'Océan Pacifique au maintien des dispositions susmentionnées, ont reçu

28
25
22
20
18

1.0

l'ordre de commencer à les mettre en vigueur envers ceux des navires étrangers," &c.

In this note "north-west coast of America" is mentioned three times, and in each case the coast of Bering Sea is included in the term. Pacific Ocean appears twice, and in both includes the Bering Sea.

Again M. de Poletica, writing to Mr. Adams on the 28th February, 1822 :—

"The first discoveries of the Russians on the north-west continent of America go back to the time of the Emperor Peter I. They belong to the attempt, made towards the end of the reign of this great Monarch, to find a passage from *the icy sea* into the *Pacific Ocean*."

* * * *

"When, in 1799, the Emperor Paul I granted to the present American Company its first Charter, he gave it the exclusive possession of the north-west coast of America, which belonged to Russia, from the 55th degree of north latitude to Bering Straits."

* * *

"From this faithful exposition of known facts, it is easy, Sir, as appears to me, to draw the conclusion that the rights of Russia, to the extent of the north-west coast, specified in the Regulation of the Russian-American Company, rest," &c.

* * * *

"The Imperial Government, in assigning for limits to the *Russian possessions on the north-west coast of America, on the one side Bering Straits, and on the other the* 51*st degree* of north latitude, has," &c.

* * * *

"I ought, in the last place, to request you to consider, Sir, that the *Russian possessions in the Pacific Ocean extend on the* north-west coast of America from Bering Straits to the 51st degree of north latitude, and on the opposite side of Asia and the islands adjacent from the same strait to the 45th degree."

Throughout this note the phrase "north-west coast" includes the coast of Bering Sea, and the last passage shows unmistakably that the Russians at that time regarded the Pacific Ocean as extending to Bering Straits.

That Russia regarded Bering Sea as included in the phrase "Pacific Ocean" is further conclusively shown by the citation from Tikhmenieff's "History" as to the proceedings with regard to American whalers in 1842 and in 1853. Appendix.

The fact that the whole territorial and maritime claim of the Ukase was in question, and was settled by the Treaties of 1824 and 1825,

also appears from the Memorial laid by Mr. Middleton before the Russian Government on the 17th December, 1823:—

American State Papers, vol. v, p. 452.

"With all the respect which we owe to the declared intention, and to the determination indicated by the Ukase, it is necessary to examine the two points of fact. (1.) *If the country to the south and east of Bering Strait, as far as the 51st degree of north latitude, is found strictly occupied.* (2.) If there has been latterly a real occupation of this vast territory . . . . The conclusion which must necessarily result from these facts does not appear to establish that the territory in question has been legitimately incorporated with the Russian Empire. The extension of territorial rights to the distance of 100 miles from the coasts upon two opposite continents, and the prohibition of approaching to the same distance from these coasts, or from those of all the intervening islands, are innovations in the law of nations, and measures unexampled."

In an earlier part of the same paper, Mr. Middleton observes:—

"The Ukase even goes to the shutting up of a strait which has never been till now shut up, and which is at present the principal object of discoveries, interesting and useful to the sciences. The very terms of the Ukase bear that this pretension has now been made for the first time."

The same appears from Mr. G. Canning's despatch to Sir C. Bagot of the 24th July, 1824:—

"Your Excellency will observe that there are but two points which have struck Count Lieven as susceptible of any question: the first, the assumption of the base of the mountains, instead of the summit, as the line of boundary; the second, the extension of the right *of navigation of the Pacific to the sea beyond Bering Straits.*

* * * *

"As to the second point, it is, perhaps, as Count Lieven remarks, new. But it is to be remarked in return, that the circumstances under which this additional security is required will be new also. By the territorial demarcation agreed to in this 'Projet,' Russia will become possessed in acknowledged sovereignty of both sides of Bering Straits.

"The Power which could think of making the Pacific a *mare clausum* may not unnaturally be supposed capable of a disposition to apply the same character to a strait comprehended between two shores of which it becomes the undisputed owner. *But the shutting up of Bering Straits, or the power to shut them up hereafter, would be a thing not to be tolerated by England.*

"*Nor could we submit to be excluded, either positively or constructively, from a sea in which the skill and science of*

our seamen has been and is still employed in enterprise interesting, not to this country alone, but to the whole civilized world.

"The protection* given by the Convention to the American coasts of each Power may (if it is thought necessary) be extended in terms to the coasts of the Russian Asiatic territory; but in some way or other, if not in the form now presented, the free navigation of Bering Straits, and of the seas beyond them, must be secured to us."

It would have been of little use securing the right to navigate through Bering Straits unless the right to navigate the sea leading to it was secured, which would not have been the case if the Ukase had remained in full force over Bering Sea. See Appendix.

The frequent references to Bering Straits and the seas beyond them show that there was no doubt in the minds of the British statesmen that, in securing an acknowledgment of freedom of navigation and fishing throughout the Pacific, they had secured it right up to Bering Straits.

That the phrase "Pacific Ocean" in the Treaty included Bering Sea is shown by the reply of the Russian Government to Governor Etholin in 1842, when he wished to keep American whalers out of Bering Sea:—

"The claim to a *mare clausum*, if we wished to advance such a claim in respect to the *northern part of the Pacific Ocean*, could not be theoretically justified. *Under Article I of the Convention of* 1824, *between Russia and the United States, which is still in force, American citizens have a right to fish in all parts of the Pacific Ocean.* But under Article IV of the same Convention, the ten years' period mentioned in that Article having expired, we have power to forbid American vessels to visit inland seas, gulfs, harbours, and bays for the purposes of fishing and trading with the natives. That is the limit of our rights, and we have no power to prevent American ships from taking whales in the open sea." "Tikhmenieff."

See also reply to Governor-General of Eastern Siberia, 1846:—

"We have no right to exclude foreign ships from *that part of the great ocean* which separates the eastern shore of Siberia from the north-western shore of America," &c.;

and the instructions which were finally issued to the Russian cruizers on the 9th December, 1853.

* (*i.e.*) By the extension of territorial jurisdiction to two leagues, as originally proposed in the course of the negotiations between Great Britain and Russia.

Writing in 1882 the 8th (20th) May, M. de Giers said :—

"Referring to the exchange of communications which has taken place between us on the subject of a Notice published by our Consul at Yokohama relating to fishing, hunting, and to trade *in the Russian waters of the Pacific*, and in reply to the note which you addressed to me, dated the 15th (27th) March, I am now in a position to give you the following information :—

"A Notice of the tenor of that annexed to your note of the 15th March was, in fact, published by our Consul at Yokohama, and our Consul-General at San Francisco is also authorized to publish it.

"This measure refers only to prohibited industries and to the trade in contraband; the restrictions which it established *extend strictly to the territorial waters of Russia only*. It was required by the numerous abuses proved in late years, and which fell with all their weight on the population of our sea-shore and of our islands, whose means of support is by fishing and hunting. These abuses inflicted also a marked injury on the interests of the *Company to which the Imperial Government had conceded the monopoly of fishing and hunting (exportation), in islands called the 'Commodore' and the 'Seals.'*

"Beyond this new Regulation, of which the essential point is the obligation imposed upon captains of vessels, who desire to fish and to hunt in the *Russian waters of the Pacific* to provide themselves at Vladivostock with the permission or licence of the Governor-General of Oriental Siberia, the right of fishing, hunting, and of trade by foreigners in our territorial waters is regulated by Article 560, and those following, of vol. xii, Part II, of the Code of Laws.

"Informing you of the preceding, I have, &c."

In 1882 a portion of the Bering Sea is referred to by the Russian Government as "Russian waters of the Pacific" and as "our Pacific waters." Witness the following :—

Papers relating to Bering Sea Fisheries, Washington, 1887, p. 106.

"*Notice by A. K. Pelikan, His Royal and Imperial Majesty's Consul, Yokohama, 15th November*, 1881.

"(Extract.)

"At the request of the local authorities of Bering and other islands, the Undersigned hereby notifies that the Russian Imperial Government publishes for general knowledge the following :—

"1st. Without a special permit or licence from the Governor-General of Eastern Siberia, foreign vessels are not allowed to carry on trading, hunting, fishing, &c., on the Russian coasts or islands in the Okhotsk and Bering Sea, or on the north-eastern coast of Asia, or within their sea boundary-line."

In the correspondence between the United

States and Russia, touching the meaning of this Regulation, it will be seen the Notice is alluded to as "relative to fishing, hunting, and trade in the Russian waters of the Pacific," and as relative to fishing and hunting in "our Pacific waters."

The Legislature of the Territory of Washington, in 1866, referred to "fishing banks known to navigators to exist along the Pacific coast from the Cortes bank to Bering Strait."

In an "Hydrographic Atlas of the Russian Possessions in the Pacific," by Captain Tebenkow, St. Petersburgh, published in 1852, he includes the water of Bering Sea, though he does not distinguish the waters of this sea from those of the Pacific.

So, in 1887, it is found that the American Representative at St. Petersburgh informed Mr. Bayard (17th February, 1887) that the Notice already quoted prohibits fishing, &c., in "the Russian Pacific coasts." This correspondence related to a seizure which had been made in Bering Straits.

Papers relating to Bering Sea Fisheries, Washington, 1887, p. 118.

Professor H. W. Elliott, of the Smithsonian Institute, who was engaged in the study of the seal islands of Alaska for the United States' Government as late as the year 1880, in his official Report on the seal islands of Alaska remarked, concerning the seals:—

Report on the Seal Islands of Alaska, Washington, 1884.

"Their range *in the North Pacific* is virtually confined to four islands in Bering Sea, viz., St. Paul and St. George, of the true Pribyloff group, and Bering and Copper, of the Commander Islands."

(The *italics* are not in the original.)

Again, he says:—

"In the North Atlantic no suitable territory for their reception exists, or ever did exist; and really nothing in the North Pacific beyond what we have designated in Bering Sea."

He also describes the rookeries in Bering Sea as "North Pacific rookeries."

And also:—

"Geographically, as well as in regard to natural history, Bering Island is one of the most curious islands in the *northern part of the Pacific Ocean*."

(The *italics* are not in the original.)

On various Charts issued by the United States' Hydrographic Office, the usage of Pacific or

North Pacific Ocean as including Bering Sea occurs, including the latest and most perfect editions now in actual use.

Thus:—

No. 909. Published March 1883 at the Hydrographic Office, Washington, D. C.:—

"Pacific Ocean. Behring's Sea, Plover Bay, from a survey by Lieutenant Maximov, Imperial Russian Navy, 1876."

(Plover Bay is situated on the Asiatic coast, near the entrance to Bering Strait.)

No. 910. Published October 1882 at the Hydrographic Office, Washington, D. C.:—

"North Pacific Ocean. Anadir Bay, Behring Sea. From a Chart by Engineer Bulkley, of New York, in 1865," &c.

(Anadir Bay is situated between latitudes 64° and 65° on the Asiatic side of Bering Sea.)

Similar evidence is afforded by the title-page of the work issued by the same Hydrographic Office in 1869, as follows:—

"Directory of Behring Sea and the coast of Alaska. . . . . Arranged from the Directory of the Pacific Ocean."

The British Admiralty Chart of Bering Sea, corrected up to November 1889, but originally compiled in 1884 (No. 2460), is likewise entitled as follows:—

"North-west Pacific. Kamchatka to Kadiak Island, including Bering Sea and Strait."

Without entering into any great detail respecting the numerous voyages of discovery in this region, which in the first instances were principally due to Russian efforts from the Asiatic coast, it is comparatively easy to place on record the salient features of this branch of the subject; and to trace its progress, more particularly, by means of the Maps published from time to time in illustration of the results of the various explorers.

The first Map in which that part of the Asiatic coast, including Kamtschatka, and extending to and beyond Bering Straits, was represented, was that published in illustration by Bering's test voyages, in 1737, in Dr. Anvilles' Atlas. It is reproduced by Mr. W. H. Dall, in the "National Geographic Magazine," Washington, 1890. At this time, neither the Commander Islands nor the Aleutian Islands were known, but the ocean to the east of the Asiatic coast is named, *Partie de la Mer Dormante*, the name,

as engraved on the Map, extending from a point to the west of the extremity of the Peninsula of Kamtschatka, in a north-easterly direction to about the position which St. Matthew Island is now known to occupy, or to the centre of Bering Sea.

After Bering's second expedition, in which the Commander himself miserably perished, but in the course of which the American coast was reached, and the Commander and Aleutian Islands in part discovered, we find a Map published by Müller, the historian and geographer of the expedition. This is entitled, in the English translation of Müller's work, published in London in 1761, "A Map of the Discoveries made by the Russians on the North-west Coast of America," published by the Royal Academy of Sciences at St. Petersburgh, and republished in London by Thomas Jefferys.

In this Map the islands, now known as the Aleutian Islands and the Commander Islands, are indicated very inaccurately, and the greater part of what is now known as Bering Sea is occupied by a great conjectural promontory of the American continent, leaving a comparatively narrow and sinuous body of water or strait running in a direction proximately parallel to the Asiatic coast, and separating the two continents. The southern portion of this is named on the Map *Sea of Kamtschatka*, the northern, *Sea of Anadir*, in equivalent characters. Bering Strait, as now known, appears without names, while the wider ocean to the south is named *Great South Sea or Pacific Ocean.*

A reproduction on a smaller scale of the same Map appears in the "London Magazine" for 1764. This is entitled, "A new Map of the North-east Coast of Asia and North-west Coast of America, with the late Russian Discoveries." It repeats the nomenclature of all the errors of the original Map, but employs the term *Great South Sea* only, the addition "or Pacific Ocean" being omitted.

After the date of the publication of Cook's third voyage in 1784, what is now known as Bering Sea began to appear on Maps in something like its true form and proportions, and in the Map accompanying the official record of his voyages, of the date mentioned, we find thatseasimply regarded as a part of the Pacific Ocean, though the names

Olutorski Sea, *Beaver Sea*, and *Gulf of Anadir* are engraved in parts of it close to the Liberian shores, and *Shoal Water* and *Bristol Bay* appear as local names of equivalent rank on the opposite American coast.

From this date onward the usages became very varied. Many Maps continued to appear till 1840 or later, upon which no name of a distinctive kind was given to Bering Sea, while upon others it became customary to extend the originally local name *Sea of Kamtschatka* to the whole of this body of water. Doubtless, because of the ambiguity attaching to this particular name, from its originally strictly local use at later dates, it began to be customary to employ Bering's name for the sea now so called, till at the present time that name may be said to have entirely superseded the older one, and to have passed into common use.

Following on this change, the name *Sea of Kamtschatka* was changed to *Gulf of Kamtschatka*, and relegated to its original place on the shore of the peninsula of the same name; while the names *Olutorski* and *Anadir* likewise became confined to the respective gulfs on the Liberian coast. For the most modern usage in this respect, see United States' Hydrographic Office Chart No. 68, 1890, and British Admiralty Chart No. 2460, 1889.

It is very noteworthy, however, in studying any series of Maps chronologically arranged, that Bering Sea is frequently without any general name, while the adjoining Sea of Okhotsk is in almost every instance clearly designated.

Had the circumstances with respect to the nomenclature of Bering Sea been different, and had that body of water been consistently supplied with a distinctive name on all Maps, it would, however, by no means necessarily follow that it was intended to maintain that it was not a part of the Pacific Ocean. An ocean may, and in all cases actually does, include numerous seas and gulfs as subordinate divisions. The mere fact that the name of the North Pacific Ocean, or equivalent name in use at different periods, is not usually engraved partly upon the area of Bering Sea in the Maps, affords no solid argument for such separation. The name of this ocean is generally found to be engraved, in large characters, upon the widest and most open tract somewhere to the south of the 50th parallel, and

between that latitude and the equator. It is almost a physical necessity that it should be so placed, in order that it may have due prominence. A few cases are nevertheless found, in which, owing to the shape or extent of particular Maps, portions of the name applied to the Pacific Ocean encroach on the areas of Bering Sea and the Sea of Okhotsk.

Fortunately, however, from a geographical point of view, we are not required to rely, for the settlement of such matters, on Maps alone, as to do so would leave many similar points in doubt in all parts of the globe. In the particular instance of the Pacific or North Pacific and Bering Sea it has been found easy to show, by reference to the strict verbal definitions of geographers in various standard works of reference and in official publications, that Bering Sea was and is understood to form an integral part of the Pacific Ocean.

The following are definitions found in the gazetteers, dictionaries, and geographers of the world, both of the present and old dates, touching the Pacific Ocean, Bering Sea, Kamtschatka, &c.:—

"*North Pacific Ocean.*—Stretches northward through 132 degrees of latitude to Behring Straits, which separate it from the Arctic Ocean." — McCulloch's "Geographical Dictionary," vol. iii, English work.

"Boreal or North, extending from Behring Strait or the Arctic Circle to the Tropic of Cancer. . . . In the north the Pacific gradually contracts in width; the continents of America and Asia stretching out and approximating, so as to leave the comparatively narrow channel of Behring Strait as the only communication between the Pacific and Arctic Oceans. Between the strait on the north, the Aleutian Islands on the south, and the remarkable peninsulas of Alaska on the east and Kamchatka on the west, one of the largest and best defined branches of the Pacific is the Sea of Behring." — Blackie's "Imperial Gazetteer," vol. ii, English work.

"Extends from the Arctic to the Antarctic Circle, through 127 degrees of latitude."

". . . . It narrows especially towards the north, where it communicates with the Arctic Ocean by Behring Strait." — Harper's "Universal Gazetteer," American work.

"Extends from the Arctic to the Antarctic Circle, through 126 degrees of latitude."

". . . . It narrows especially towards the north, where it communicates with the Arctic Ocean by Behring Strait." — Also Johnston's "Dictionary of Geography," English work.

"Behring Island, the most westerly of the Aleutian group in the North Pacific, in 55° 22' north latitude, 166° east longitude. It is rocky and desolate, and is only remarkable as being the place where the navigator, — Johnston's "General Gazetteer," English work.

"Encyclopedia Britannica," ninth edition, New York, 1878 vol. iii, p. 509.

The "English Encyclopedia."

"Encyclopedia Britannica," ninth edition, Edinburgh, 1885, vol. xviii, p. 115.

Johnston's "Dictionary of Geography."

"Imperial Gazetteer," vol. i; Harper's "Universal Gazetteer;" and Murray's "Gazetteer of the World." Scotch work. Gives same description.

Behring, was wrecked and died in 1741. Population, 2,500."

"Behring Strait, the narrow sea between the north-east part of Asia and the north-west part of North America, connecting the North Pacific with the Arctic Ocean."

"Behring Strait, which connects the Pacific with the Arctic. . . ."

"Behring Island is situated in the North Pacific. . . ."

"Kamchatka, a peninsula projecting from the north-eastern part of Asia into the Pacific Ocean, *i.e.*, into Behring Sea.

"*Extent.*—The Pacific Ocean, formerly called the South Sea, and sometimes still so named by the French and Germans (la Mer Sud; Sudsee, Australocean), with whom, however, la Mer (l'Océan) Pacifique, and Grosser Ocean, or Stilles Meer, are the more usual designations, is bounded on the north by Behring Strait and the coasts of Russia and Alaska; on the east by the west coasts of North and South America; on the south the imaginary line of the Antarctic Circle divides it from the Antarctic Ocean, while its westerly boundary is the east coast of Australia, the Malay Archipelago separating it from the Indian Ocean and the eastern coasts of the Chinese Empire. Some modern geographers place the southern limit of the Atlantic, Pacific, and Indian Oceans at the 40th parallel, and name the body of water which surrounds the earth between that latitude and the Antarctic Circle the Southern Ocean.

"Although differing from the Atlantic in its general form, being more nearly land-locked to the north, the Pacific Ocean resembles it, in being open to the south, forming, in fact, a great projection northwards of that vast Southern Ocean of which the Atlantic is another arm.

"The Pacific is the largest expanse of water in the world, covering more than a quarter of its superficies, and comprising fully one-half of its water surface.

"It extends through 132 degrees of latitude—in other words, it measures 9,000 miles from north to south. From east to west its breadth varies from about 40 miles at Behring Strait, where Asia and America come within sight of each other, to 8,500 miles from California and China, on the Tropic of Cancer, and to more than 10,000 miles on the Equator, between Quito and the Moluccas, where the ocean is the widest. The area has been variously estimated at from 50,000,000 to 100,000,000 square miles; but defining its boundaries as above, Keith Johnston, from careful measurement, estimated it, with probably a near approach to the truth, at 67,810,000 square miles."

"Worcester's Dictionary."

"*Bering Sea.*—That part of North Pacific Ocean between Aleutian Islands and Behring Strait.

"Is that portion of the North Pacific Ocean lying between the Aleutian Islands and Behring Strait."

Malham, John, "Naval Gazetteer," 1795.

"Kamschatka Sea is a large branch of the Oriental or North Pacific Ocean.

Brookes, R., "General Gazetteer," 1802.

"Beering's Straits, which is the passage from the North Pacific Ocean to the Arctic Sea.

"Beering's Island. An island in the Pacific Ocean. [Behring's Island is in Behring's Sea.]

"Kamschatka. Bounded east and south by Pacific.

"Kamtschatka. Bounded on the north by the country of the Koriacs, on the east and south by the North Pacific Ocean, and on the west by the Sea of Okotsk.

"Beering's Island. In the North Pacific Ocean.

"Beering's Island. An island in the North Pacific Ocean.

"Kamtchatka. River, which runs into the North Pacific Ocean.

"Kamtchatka. Peninsula, bounded on the east and south by the North Pacific Ocean.

"Islands in the Eastern or Great Pacific Ocean: Behring's Isle.

"Stilles Meer. Vom 5 nordl. Br. an bis zur Beringsstrasse aufwarts stets heftige Sturme. [Behring's Strait is at the northern extremity of Behring's Sea.]

"Behring's Island. An island in the North Pacific Ocean.

"Beering's Island. In the North Pacific Ocean.

"Beering's Island. In the Pacific.

"Mer Pacifique. Il s'étend du nord au sud depuis le Cercle Polaire Arctique, c'est-à-dire, depuis le Détroit de Behring, qui le fait communiquer à l'Océan Glacial Austral.

"Stilles Meer. Vom 30 südlicher Breite bis zum 5 nördlicher Breite verdient es durch seine Heiterkeit und Stille den namen des Stillen Meers; von da an bis zur Beringsstrasse ist es heftigen Stürmen unterwofen.

"Beering's Island. In the North Pacific Ocean.

"Bhering's Strait connects the Frozen Ocean with the Pacific.

"The Anadir flows into the Pacific Ocean.

"The principal gulfs of Asiatic Russia are: the Gulf of Anadir, near Bhering's Strait; the Sea of Penjina, and the Gulf of Okhotsk, between Kamtchatka and the mainland of Russia—all three in the Pacific Ocean.

"L'Océan Pacifique Boréal s'étend depuis le Détroit de Behring jusqu'au tropique de Cancer.

"Le Détroit de Behring. A commencer par ce détroit, le Grand Océan (ou Océan Pacifique) forme la limite orientale de l'Asie.

"Behring (détroit célèbre). Il joint l'Océan Glacial Arctique au Grand Océan.

"The Pacific Ocean. Its boundary-line is pretty well determined by the adjacent continents, which approach one another towards the north, and at Behring's Strait which separates them, are only about 36 miles apart. This strait may be considered as closing the Pacific on the north.

"Behring (Détroit de), à l'extrémité nord-est de l'Asie, sépare Continent de l'Amérique et l'Océan Glacial Arctique de l'Océan Pacifique.

"Behring (Mer de) partie de l'Océan Pacifique.

"Behring (Détroit de). Canal de l'océan . . . . unissant les eaux de l'Océan Pacifique à celles de l'Océan Arctique.

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"Pacific Ocean. Between longitude 70° west and 110° east, that is, for a space of over 180°, it covers the greater part of the earth's surface, from Behring Straits to the Polar Circle, that separates it from the Antarctic Ocean.

"Behring (Détroit de). Canal du Grand Océan unissant les eaux de l'Océan Pacifique à celles de l'Océan Glacial Arctique.

"Behring Sea, sometimes called the Sea of Kamtchatka, is that portion of the North Pacific Ocean lying between the Aleutian Islands and Behring's Strait.

"Behring's Island. An island in the North Pacific Ocean.

"Behring's Strait, which connects the Pacific with the Arctic Ocean, is formed by the approach of the continents of America and Asia.

"Pacific Ocean. Its extreme southern limit is the Antarctic Circle, from which it stretches northward through 132° of latitude to Behring's Strait, which separates it from the Arctic Ocean.

"Behring (Détroit de). Canal ou bras de mer unissant les eaux de l'Océan Glacial Arctique à celles de l'Océan Pacifique.

"Behring's Strait. The narrow sea between the north-east part of Asia and the north-west part of North America, connecting the North Pacific with the Arctic Ocean.

"Behring Sea, or Sea of Kamchatka, is that part of the North Pacific Ocean between the Aleutian Islands in latitude 55° north and Behring Strait in latitude 66° north, by which latter it communicates with the Arctic Ocean.

"Behring, or Bhering. A strait, sea, island, and bay, North Pacific Ocean.

"Bering's Meer. Der nordöstlichste Teil des Stillen Ocean's.

"Beringsstrasse. Meerenge das nordöstlichste Eismeer mit dem Stillen Ocean verbindend.

"Behring's Sea. North-east part of the Pacific between Asia and America.

"Behring Strait connects the Pacific with the Arctic Ocean.

"Behring Sea. A part of the Pacific Ocean, commonly known as the Sea of Kamchatka.

"Behring's Strait, connecting the North Pacific with the Arctic Ocean.

"Behring's Sea, sometimes called the Sea of Kamchatka, is that portion of the North Pacific Ocean lying between the Aleutian Islands and Behring's Strait."

The United States' Government attached importance to the very early employment of some distinctive name for Bering Sea, and reference has been made to several of the older Maps. It is, however, submitted that even in restricting the argument to Maps, the important question is that relating to the Maps and Charts of the years immediately antecedent to 1824 and 1825, in

which the Conventions dealing with the Ukase of 1821 were concluded. To such Maps the negotiators doubtless referred, and it will be of special importance if any certainty can be arrived at as to the particular Maps which were in their hands.

Reverting, however, to the earlier Maps specially instanced by the United States' Government, it will be found that even these do not bear out the assertions based by him upon them. A Map showing Cook's voyages, and published in 1784, is first referred to as showing the "*Sea of Kamschatka*" in "absolute contradistinction to the *Great South Sea* or Pacific Ocean."

This is doubtless the Map included in the list attached to the despatch, and said to have been published by William Faden, a Map which has so far eluded our search.

Turning, however, to the Maps in the officially published account of Cook's third voyage of the same date, both those in the quarto and octavo editions, and those also in French and German translations of later date, it is found that Bering Sea appears absolutely and markedly *without any distinctive name.*

The Map published in the "London Magazine" in 1764, which is next referred to, is, as already explained, a reduction of Müller's Map, which is also particularly cited.

The circumstances under which the nam s *Sea of Kamschatka* and *Sea of Anadir* appear on these Maps h ve been noted on a previous page, and are such as to show that these names, nor either one of them, can be justly referred to as applying to the area of Bering Sea as now known.

The list of 05 Maps referred to in Mr. Blaine's despatch of the 17th December, 1890, though apparently formidable from its very length, is found to extend from the year 1743 to the year 1829, both inclusive, and consists solely of those Maps upon which a special designation of some kind is supposed to be found for Bering Sea. As already stated, this proves nothing with regard to the relation by Bering Sea to the Pacific as a whole, while it is further observable that, in compiling the list, many Maps of very doubtful or imperfect characters have been heterogeneously brought together. Thus, in respect to Cook's explorations, not a single obscure Map is cited, while the official and original Maps are ignored, as has already been explained.

Again, from Thompson's large Atlas of date 1817 but a single Map is cited, and this without such reference as can enable it to be identified; while, as a matter of fact, in this Atlas Bering Sea appears upon those Maps as the *Sea of Kamtschatka*. On three other Maps this name is evidently confined to the waters immediately adjacent to the peninsula of the same name, and on two the greater part of Bering Sea is included without any names. Under date 1810, a Map by Barney is quoted as showing the name *Sea of Kamtschatka* applied to Bering Sea, but the only Map by that author and of that date which we have been able to find is a "Chart of the north coast of Asia and of the sea to the north of Bering Strait," in which the greater part of Bering Sea is included, but without name, while the northern portion of the Sea of Okhotsk, also included, is prominently named. Still, again, under 1825, a Map in Buttar's Atlas (doubtless No. 16) is quoted as showing the name *Sea of Kamtschatka*, while the first Map in that Atlas upon which Bering Sea appears without name, though the *Sea of Ochotsk* and other similar seas are named, is ignored.

This particular criticism applies, however, to a small portion of the entire list, since the whole list was not examined.

North-west coast.

The term *north-west coast*, or, more fully, *north-west coast of North America*, is a descriptive one of a peculiar character.

Looking at the Map, it will be seen that the coast, which has not infrequently been so named, is in reality the westerly or south-westerly, facing coast of North America, which forms the eastern and north-eastern coast-line of the North Pacific.

This term, however, appears in the title of some very early Maps, such as that by Müller, dated 1761, which is entitled, "A Map of the Discoveries made by the Russians on the North-west Coast of America;" that accompanying the original edition of Cook's third voyage, dated 1784, and entitled, "Chart of the North-west Coast of America [and the North-east Coast of Asia;" and that in Vancouver's voyage (1798), named "A Chart showing part of the Coast of North-west America."

The last-named Map, however, affords a clue to the meaning of the term, and shows that, in these instances, we should read in full "north-western part of the North American continent,"

and, conversely, "north-eastern part of the continent of Asia." This is particularly obvious, when it is remembered that, especially in the case of the first of the Maps above referred to, the explorations set down were conducted from Russia, by way of Okotsk, in the sea of the same name, and that, consequently, if directions from the point of departure had been considered, what is named the north-east coast of Asia would have in reality been the *north-west coast* of that continent.

It is very probable that a special and somewhat different meaning came to be connected with the *north-west coast of America* at a later date, when it was regarded and spoken of by inhabitants of the United States, situated in a south-easterly bearing from all this part of the North American coast; but, in admitting this, it is also evident that the *north-west coast*, as thus secondarily applied, must have included the whole coast lying north-westerly from the point of observation or trending from any given point of departure on the west coast of the continent in a general north-westerly direction.

It has, however, been maintained that at some still later date the term *north-west coast* came to bear a quite definite signification as referring to a certain particular part of the western coast of North America.

In this case such usage may be expected to be found recorded on the Maps at some particular epoch, and thereafter to have been continued with precision.

The term is not found as a geographical one defined verbally, and thus it is to Maps alone that we may turn with the hope of finding it with this particular meaning.

As the result of the examination of a large series of Maps relating particularly to the dates near to that of the Ukase of 1821 and the Conventions of 1824 and 1825, it is, however, disappointing to observe that this term is seldom met with, and then only in a very lax and general sense.

Müller's Map of 1761, republished by Jeffrey's in London, has already been referred to. The description "north-west coast of America" here occurs in the title only, while the coast delineated extends to what is now known as Bering Strait. A Map published in the "London Magazine" in 1764 also refers to "north-west coast of America" in its title, but as it is

merely a reduced copy of Müller's Map, does not throw any further light on the subject.

Coming down to the date of Cook's third voyage in 1784, we again find a corresponding title, viz., "Chart of the North-west Coast of America and North-east Coast of Asia." This Chart is drawn so as to include the coast from the vicinity of the point where it was first reached by Cook, about latitude 44°, to Say Cape, to the north of Bering Strait, and in the Arctic Ocean. The same remarks apply to the corresponding Map in the French edition of Cook's Voyage, dated 1785.

In 1798, Vancouver's Voyage contains "A Chart showing *part* of the coast of North-west America," and this includes the coast-line continuously from latitude 30° to a point a little west of Kadiak Island. A few years later, in 1802, we find Charts 1 to 3 published in connection with the voyage of the "Sutil" and "Mexicana," in Madrid, entitled "La costa nord-ouest de America." These continuously include from about latitude 17° northward and westward to Unalaska Island in the Aleutian chain.

In Rossi's Atlas, published in Milan in 1820, on Map 6, the name *costa nord-ouest* actually appears engraved on the face of the Map, and runs from a point a little to the west of the head of Cook's inlet on the continental land southward to about the 50th parallel, while on another Map in the same Atlas (No. 39) the words *parte della costa nord-ouest dell'America* are shown extending along the land from the longitude of Kadiak southward to latitude 39°, or much further than in the first instance, notwithstanding the restriction of the title.

In "Roquefeuil's Voyages," published in Paris in 1823, a Map occurs, entitled "Carte de la Côte Nord-ouest d'Amérique," and this includes an extent of coast from latitude 34° 30′ northward and westward to the mainland coast west of Kadiak Island.

Some years later, in 1844, on the elaborate Map accompanying M. Duflot de Morpas' work, published in Paris in 1844, "Côte Nord-ouest de l'Amérique," is engraved running to seaward of that part of the coast which extends from latitude 60° to the entrance of the Strait of Fuca.

The above are all of the Maps included in the list, elsewhere given, upon or in connection with which the term *north-west coast* or *north-west*

coast of America, or its equivalents, has been found. None of the works published in the United States at about the dates specially referred to have been found to include it.

Mr. Blaine, in his despatch of the 17th December, 1890, specially refers to a Map "published by the Geographic Institute at Weimer" in 1803, as showing the *Nörd West Kuste*, which is said to include "the coast from the Columbia River (49°) to Cape Elizabeth (60°)." It has so far been impossible to consult this Map, but the description given of it may doubtless be assumed as correct. It will be noted that the usage here found does not precisely agree with that on any of the above-cited Maps, though not nearly to that of Duflot de Morpas.

In Barney's "Chronological History of North-eastern Voyages of Discovery," London, 1819, chapter 19, is entitled "Captain Cook on the North-west Coast of America." This title is continued as a side-note to the pages following as far as to p. 229, or from the point at which Cook first sighted the land in latitude 44½° to Unalaska. After this point "west coast" is substituted for "north-west coast," showing very clearly where the author, who was a member of Cook's expedition, supposed the north-west coast to end.

Robert Greenhow, Translator and Librarian to the United States' Department of State.

Greenhow's works (well known in connection with the discussion of the "Oregon question") afford a detailed and conclusive means of ascertaining the views officially held by the United States' Government on the meaning of *Pacific Ocean*, *Bering Sea*, *north-west coast*, and the extent of abandonment of claims made by Russia in Ukase of 1821, by the Convention of 1824.

A Memoir was prepared on the official request of L. F. Linn, Chairman of Select Committee on the territory of Oregon, by order of John Forsyth, Secretary of State. It includes a Map entitled "The North-west Coast of North America and adjacent Territories," which extends from below Acapulco in Mexico to above the Kuskogunu River mouth in Bering Sea, and embraces also the greater part of the Aleutian chain.

This "History" was officially presented to the Government of Great Britain by the Government of the United States in July 1845, in connection with the Oregon discussion and in pursuance of an Act of Congress, p. 141.

"Memoir Historical and Political of the north-west coast of North America and the adjacent territories, illustrated by a Map and a geographical view of those countries, by Robert Greenhow, Translator and Librarian to the Department of State." Senate, 26th Cong., 1st Session (174), 1840.

The same Memoir, separately printed, apparently in identical form, and with the same Map, same pagination, Wiley and Putnam, New York, 1840.

"The Geography of Oregon and California and the other territories on the north-west coast of North America." New York, 1845.

"The History of Oregon and California and the other territories on the north-west coast of North America, by Robert Greenhow, Translator and Librarian to the Department of State of the United States; author of a Memoir Historical and Political, on the north-west coast of North America, published in 1840 by direction of the Senate of the United States." New York, 1845.

This is a second edition, and in the preface it is explained that its issue was rendered necessary to supply 1,500 copies of the work which had been ordered for the General Government.

The same work. First edition, London, 1844.

Both editions contain Maps, which appear to be identical, but different from the Maps accompanying works (*a*) and (*b*), though including nearly the same limits with them.

The following is the correspondence accompanying this presentation:—

"*Mr. Buchanan to Mr. Pakenham.*

"*Department of State, Washington,*
"Sir, "*July* 12, 1845.

"In pursuance of an Act of Congress approved on the 20th February, 1845, I have the honour to transmit to you herewith, for presentation to the Government of Great Britain, one copy of the 'History of Oregon, California, and the other territories on the North-west Coast of America,' by Robert Greenhow, Esq., Translator and Librarian of the Department of State.

"I avail, &c.

(Signed) "JAMES BUCHANAN."

"*Mr. Pakenham to the Earl of Aberdeen.*—(*Received* "*August* 16.)

"My Lord, "*Washington, July* 29, 1845.

"I have the honour herewith to transmit a copy of a note which I have received from the Secretary of State of the United States, accompanied by a copy of Mr. Greenhow's work on Oregon and California, which, in pursuance of an Act of Congress, is presented to Her Majesty's Government.

"Although Mr. Greenhow's book is already in your Lordship's possession, I think it right, in consequence of the official character with which it is presented, to forward to your Lordship the inclosed volume, being the identical one which has been sent to me by Mr. Buchanan.

"I have not failed to acknowledge the receipt of Mr. Buchanan's note in suitable terms.

"I have, &c.

(Signed) "R. PAKENHAM."

Touching the meaning of the terms *north-west coast and Pacific Ocean*, and the meaning attached to the relinquishment of Russian claims by the Convention of 1824, in the first part of the "Memoir," under the heading "Geography of the Western Section of North America," the following passage occurs:—

"The *north-west coast** is the expression usually employed in the United States at the present time to distinguish the vast portion of the American continent which extends north of the 40th parallel of latitude from the Pacific to the great dividing ridge of the *Rocky Mountains*, together with the contiguous islands in that ocean. The southern part of this territory, which is drained almost entirely by the River Columbia, is commonly

* N.B.—The *italics* in this and subsequent quotations are those employed by Greenhow himself.

called *Oregon*, from the supposition (no doubt erroneous) that such was the name applied to its principal stream by the aborigines. For the more northern parts of the continent many appellations, which will hereafter be mentioned, have been assigned by navigators and fur traders of various nations. The territory bordering upon the Pacific southward, from the 40th parallel to the extremity of the peninsula which stretches in that direction as far as the Tropic of Cancer, is called *California*, a name of uncertain derivation, formerly applied by the Spaniards to the whole western section of North America, as that of *Florida* was employed by them to designate the regions bordering upon the Atlantic. The north-west coast and the west coast of California together form the *west coast of North America;* as it has been found impossible to separate the history of these two portions, so it will be necessary to include them both in this geographical view."*

The relations of Bering Sea to the Pacific Ocean are defined as follows in the Memoir:—

"The part of the Pacific north of the Aleutian Islands which bathes those shores is commonly distinguished as the *Sea of Kamschatka*, and sometimes as *Beering's Sea*, in honour of the Russian navigator of that name who first explored it" (pp. 4–5).

Again, in the "Geography of Oregon and California," as follows:—

"Cape Prince of Wales, the westernmost point of America, is the eastern pillar of Bering's Strait, a passage only 50 miles in width, separating that continent from Asia, and forming the only direct communication between the Pacific and Arctic Oceans.

* * * *

"The part of the Pacific called the *Sea of Kamtchatka*, or Bering's Sea, north of the Aleutian chain, likewise contains several islands," &c. (p. 4).

* In the following pages the term *coast* will be used, sometimes as signifying only the sea-shore, and sometimes as embracing the whole territory, extending therefrom to the sources of the river; care has been, however, taken to prevent misapprehension, where the context does not sufficiently indicate the true sense. In order to avoid repetitions, the *north-west coast* will be understood to be the *north-west coast of North America;* all *latitudes* will be taken as *north latitudes*, and all *longitudes* as *west from Greenwich*, unless otherwise expressed.

* * * * *

"The northern extremity of the west coast of America is *Cape Prince of Wales*, in latitude 65 degrees 52 minutes, which is also the westernmost spot in the whole continent; it is situated on the eastern side of *Beering's Strait*, a channel 51 miles in width, connecting the Pacific with the *Arctic* (or *Icy* or *North Frozen*) *Ocean*, on the western side of which strait, opposite Cape Prince of Wales, is *East Cape*, the eastern extremity of Asia. Beyond Beering's Strait the shores of the two continents recede from each other. The *north coast of America* has been traced from Cape Prince of Wales north-eastward to *Cape Barrow*," &c., pp. 3–4.

In the "History of Oregon and California," the Sea of Kamtchatka, or Bering's Sea, is again referred to as a part of the Pacific Ocean.

In respect of the understanding by the United States of the entire relinquishment of the claims advanced by the Ukase of 1821 in the Russian and United States' Convention of 1824, the following is found on a later page of the volume last referred to:—

> "This Convention does not appear to offer any grounds for dispute as to the construction of its stipulations, but is, on the contrary, clear, and equally favourable to both nations. The rights of both parties to navigate every part of the Pacific, and to trade with the natives of any places on the coasts of that sea not already occupied, are first acknowledged" (p. 342).

It is thus clear, as the result of the laborious investigations undertaken by Greenhow on behalf of the United States' Government, and accepted by that Government in an official document:—

1. That Bering Sea was a part of the Pacific.
2. That the north-west coast was understood to extend to Bering Strait.
3. That Russia relinquished her asserted claims over "every part of the North Pacific."

Coming down, however, to much later times, the same laxity is discovered in the use of this term to prevail, even in the case of those likely to be best informed on the subject.

Thus, in the United States' "Alaska Pacific Coast Pilot," Part I, 1883, which was edited by Mr. W. H. Dall (a gentleman whose familiarity with all historical and geographical points connected with the west coast is well known), on p. 237, under "List of Charts issued by the United States' Coast and Geodetic Survey—Sailing Charts—*North-west Coast of America*," is found catalogued "No. 4, Chirikoff Island to Unimak." This particular Chart is entered as "in preparation," but its title carries the term "north-west coast" up to or beyond latitude 60° *within* Bering Sea.

In Mr. Blaine's despatch of the 17th December, 1890, particular importance is attached to a small and rather poorly engraved Map which appears in Mr. H. H. Bancroft's works, vol. xxvii (1884), which is the first of two volumes entitled "History of the North-west Coast."

This Map is entitled "Map of the North-west Coast," and is actually reproduced in fac-simile in

the despatch. This Map appears to be regarded as an argument conclusive in itself, and it is said of it, "The Map will be found to include precisely the area which has been steadily maintained by this Government in the pending discussion."*

If Mr. Blaine had written "precisely that part of the west coast of America," he would have been more accurate, for of this coast the Map in question actually includes from about latitude 40°, in the vicinity of Cape Mendicino, to the vicinity of that part of the coast where latitude 60° reaches the Pacific.

The *area* of the Map is, however, a very different matter, as it stretches eastward so as to include Hudson Bay and Strait, Doris Strait, and the St. Lawrence River nearly to its mouth; in fact, almost the entire northern width of the North American Continent. We are fortunately, however, not obliged to criticize this point by the exigencies which determined the lines upon which this particular Map was cut off by the draftsman alone—for it is evidently by its construction a reproduction of some part of a more inclusive Map of the continent.

The text of the work to which it is an appendage explains the limits which the historian has placed himself under, and, at the same time, very clearly shows that he did not suppose the title of his work alone would render this clear to his readers. On the second page of the first volume, and in explaining the scope of his work, Mr. Bancroft writes: "The term north-west coast, *as defined for the purposes of this history*, includes the territory known in later times as Oregon, Washington, and British Columbia;" thus rendering it obvious that for convenience he embraced under that term certain parts of the west coast which subsequently shaped themselves into three distinct territorial divisions. As he had already treated of the history of California (vol.), this was excluded, and as he proposed to treat separately of Alaska (vol. xxxiii), this, also, was

* Mr. Blaine does not appear to have noticed one curious circumstance connected with this "carefully prepared Map." In the northern part of the Map, each tenth degree of latitude is indicated, including 70°, 60°, and 50°, and, on the west coast, the 40th parallel is also shown by a line correctly placed, to the south of Cape Mendicino. It is indicated in the margin as latitude "42." On the opposite or eastern side of the Map the line of latitude actually shown is latitude 42, and it is correctly so named. This peculiar mistake occurs both on the original and on the reproduction.

eliminated. As a matter of fact, however, he found it convenient to include in his Map a greater extent of the west coast than that above defined, to the north and south, as we have already seen he did not scruple to do to the east. His Map actually includes a considerable part both of the coast and the interior of Alaska in one direction, and of what is now the State of California in the other.

The fourth question or point in the case is as follows:—

Did not all the rights of Russia as to jurisdiction and as to the seal fisheries in Bering Sea east of the water boundary in the Treaty between the United States and Russia of the 30th March, 1867, pass unimpaired to the United States under that Treaty?

Treaty of Cession, 1867.

The cession of Alaska took place in 1867. In that Treaty, ratified by the United States on the 28th May, 1867, Russia ceded to the United States a tract of which—

"The western limit within which the territories and dominion conveyed are contained passes through a point in Behring Straits on the parallel of 65° 30′ north latitude, at its intersection by the meridian which passes midway between the Islands of Krusenstern, or Ignalook, and the Island of Ratmanoff, or Noonarbook, and proceeds due north, without limitation, into the same Frozen Ocean. The same western limit, beginning at the same initial point, proceeds thence in course nearly south-west, through Behring Straits and Behring Sea, so as to pass midway between the north-west point of the Island of St. Lawrence and the south-east point of Cape Choukotski, to the meridian of 172° west longitude; thence, from the intersection of that meridian, in a south-westerly direction, so as to pass midway between the Island of Attou and the Copper Island of the Kormandorski couplet or group in the North Pacific Ocean, to the meridian of 193° west longitude, so as to include in the territory conveyed the whole of the Aleutian Islands east of that meridian."

In a sea so full of islands as the Behring, a line similar to the one drawn above was necessary for a clear division of the sovereignty of those islands. It avoids an enumeration. There was no grant of sea effected by the delimitation.

Russia took care to grant only the territories and dominion within those lines.

No attempt is made to describe by miles and bounds the territory, but it is said to be *contained within* certain geographical limits.

The "territory" will be found on the continent and in the adjacent islands within those limits.

The following is the French and original version of Articles I, II, and IV of the Treaty of Cession of 1867, together with an English translation appearing in United States' documents, containing the description of the property situated in the Behring Sea, which was transferred by Russia:—

[English version.]

CLE I.

"His Majesty the Emperor of All the Russias agrees to cede to the United States, by this Convention, immediately upon the exchange of the ratifications thereof, all the territory and dominion now possessed by His said Majesty on the Continent of America and in the adjacent islands, the same being contained within the geographical limits herein set forth, to wit: The eastern limit is the line of demarcation between the Russian and the British possessions in North America, as established by the Convention between Russia and Great Britain of the 16th (28th) February, 1825, and described in Articles III and IV of said Convention in the following terms:—

"Commencing from the southernmost point of the island called Prince of Wales' Island, which point lies in the parallel of 54° 40′ north latitude, and between the 131st and the 133rd degrees of west longitude (meridian of Greenwich), the said line shall ascend to the north along the channel called Portland Channel, as far as the point of the continent where it strikes the 56th degree of north latitude; from this last-mentioned point, the line of demarcation shall follow the summit of the mountains situated parallel to the coast as far as the point of intersection of the 141st degree of west longitude (of the same meridian); and, finally, from the said point of intersection, the said meridian line of the 141st degree in its prolongation as far as the Frozen Ocean.

* * * *

"The western limit, within which the territories and dominion conveyed are contained, passes through a point in Behring Straits on the parallel of 65° 30′ north latitude, at its intersection by the meridian which passes midway between the Island of Krusenstern or Ignalook, and the Island of Ratmanoff or Noonarbook, and proceeds due north, without limitation, into the same Frozen Ocean. The same western limit, beginning at the same initial point, proceeds thence in a course nearly south-west, through Behring Straits and Behring Sea, so as to pass midway between the north-west point of the Island of St. Lawrence and the south-east point of Cape Choukotski to the meridian of 172° west longitude; thence, from the intersection of that meridian, in a south-westerly direction, so as to pass midway between the Island of Attou and the Copper Island of the Kormandorski couplet or group in the North Pacific Ocean to the meridian of 193° west

longitude, so as to include in the territory conveyed the whole of the Aleutian Islands east of that meridian.

* * * *

"ARTICLE II.

"In the cession of territory and dominion made by the preceding Article are included the right of property in all. . . .

* * * *

"ARTICLE VI.

". . . . and the cession hereby made conveys all the rights, franchises, and privileges now belonging to Russia in the said territory or dominion, and appurtenances thereto."

[French version.]

"ARTICLE I.

"Sa Majesté l'Empereur de Toutes les Russies s'engage, par cette Convention, à céder aux États-Unis, immédiatement après l'échange des ratifications, tout le territoire avec droit de souveraineté actuellement possédé par Sa Majesté sur le Continent d'Amérique ainsi que les îles contiguës, le dit territoire étant compris dans les limites géographiques ci-dessous indiquées, savoir: la limite orientale est la ligne de démarcation entre les possessions Russes et Britanniques dans l'Amérique du Nord, ainsi qu'elle est établie par la Convention conclue entre la Russie et la Grande-Bretagne, le 16 (28) Février, 1825, et définie dans les termes suivants des Articles III et IV de la dite Convention:—

"'A partir du point le plus méridional de l'Ile dite Prince of Wales, lequel point se trouve sous le parallèle du 54° 40′ de latitude nord, et entre le 131e et le 133e degré de longitude ouest (méridien de Greenwich), la dite ligne remontera au nord le long de la passe dite Portland Channel, jusqu'au point de la terre ferme, où elle atteint le 56e degré de latitude nord; de ce dernier point la ligne de démarcation suivra la crête des montagnes situées parallèlement à la côte jusqu'au point d'intersection du 141e degré de longitude ouest (même méridien); et finalement, du dit point d'intersection la même ligne méridienne du 141e degré formera dans son prolongement jusqu'à la Mer Glaciale la limite entre les possessions Russes et Britanniques sur le Continent de l'Amérique Nord-Ouest.'

* * * * *

"La limite occidentale des territoires cédés passe par un point au Détroit de Behring sous le parallèle du 65° 30′ de latitude nord à son intersection par le méridien qui sépare à distance égale les Isles Krusenstern ou Ignalook et l'Ile Ratmanoff ou Noonarbook, et remonte en ligne directe, sans limitation, vers le nord, jusqu'à ce qu'elle se perde dans la Mer Glaciale. Commençant au même point de départ, cette limite occidentale suit de là un cours presque

sud-ouest, à travers le Détroit de Behring et la Mer de Behring, de manière à passer à distance égale entre le point nord-ouest de l'Ile Saint-Laurent et le point sud-est du Cap Choukotski jusqu'au méridien 172 de longitude ouest; de ce point à partir de l'intersection de ce méridien, cette limite suit une direction sud-ouest de manière à passer à distance égale entre l'Ile d'Attou et l'Ile Copper du groupe d'îlots Kormandorski dans l'Océan Pacifique septentrional, jusqu'au méridien de 193° de longitude ouest, de manière à enclaver, dans le territoire cédé, toutes les Iles Aléoutes situées à l'est de ce méridien.

* * * * *

"ARTICLE II.

"Dans le territoire cédé par l'Article précédent à la souveraineté des États-Unis, sont compris le droit de propriété sur . . . .

* * * * *

"ARTICLE VI.

". . . . et la cession ainsi faite transfère tous les droits, franchises, et privilèges appartenant actuellement à la Russie dans le dit territoire et ses dépendances."

It will be observed that in none of these Articles is there a direct reference to any extraordinary or special dominion over the waters of the Bering Sea, nor, indeed, over any other portion of the North Pacific Ocean.

Neither is there a suggestion that any special maritime right existed which could be conveyed.

The language of the Convention is, on the contrary, most carefully confined to "*territory* with the right of sovereignty actually possessed" by Russia at the date of the cession.

Article I of the Treaty of 1867 refers to "tout le territoire avec droit ou souveraineté actuellement possédé par Sa Majesté sur le Continent d'Amérique ainsi que les îles contiguës, ce dit territoire étant compris dans les limites géographiques ci-dessous indiquées, savoir. . . ."

(See "Nouveau Dictionnaire de la Langue Française; par M. Noël et M. Chapsal; seizième édition; Paris, 1857.")

These words are very freely translated in the Executive documents of the United States, where the first words of the extract are rendered as follows: "All the territory and dominion now possessed by His said Majesty." A correct interpretation of the French words would be "all the territory, with the right of sovereignty, now possessed by His said Majesty on the Continent of America and the islands adjacent thereto."

The word "dominion" occurs, however, in the translation as if the land and a separate dominion or right, apart from the land, were intended.

Russia was, it will be seen, careful to convey only the "territoire," *i.e.*, "espace de terre soumis à un Souverain qui dépend d'une juridiction."

In these Articles the limits of a portion only of the Bering Sea are defined to show the boundaries within which the territory "on the Continent of America and in the adjacent islands" ceded is contained.

In Article VI, Russia again makes it emphatic that she is conveying "the rights, franchises, and privileges now belonging" to her in the said "territoire" (which the English translation referred to renders "territory *or dominion*") and appurtenances thereto.

Did the *geographical limits* in the first Article *within* which the "territory on the Continent of America or in the adjacent islands" are said to be "*contained*," purport to include in the grant anything but "the territory ON the Continent of America and IN the adjacent islands"?

The eastern geographical limit is described as the "line of demarcation" between the Russian and British possessions; and no explanation or qualification is superadded. But when the western geographical limit is described, care is taken to repeat the language, introducing the description "*within which* the territories conveyed are *contained*," each course carries with it an explanation, and the final clause leaves no room for doubt, and distinctly negatives any implication of an attempt to convey any portion of the high seas—for the said western line is drawn, not so as to embrace any part of the high seas, but, as expressed in the apt language of the Treaty—"SO AS TO INCLUDE IN THE TERRITORY CONVEYED THE WHOLE OF THE ALEUTIAN ISLANDS EAST OF THAT MERIDIAN."

Character of the western geographical limit, and *reason* for its adoption. *Aleutian Islands, &c.*

"Memoir, Historical and Political, of the North-west Coast of North America, &c., by Robert Greenhow, Translator and Librarian to the Department of State" [U.S.] Senate, 26th Cong., 1st Sess. [174], 1840; also separately published, New York, 1840.

"The Aleutian Archipelago is considered by the Russians as consisting of *three groups* of islands, of which the largest are *Unimak*, *Unalashka*, and *Umnak*; next to these are the *Andreanowsky Islands*, among which are *Atscha*, *Tonaga*, and *Kanaga*, with many smaller islands, sometimes called the *Rat Islands*; the most western group is that first called the *Aleutian* or *Aleoutsky Islands*, which are *Attu*, *Mednoi* (or *Copper Island*), and *Bering's Island*" (p. 5).

In the "History of Oregon and California," &c., by the same author, the Commander Islands (Copper and Bering Islands) are again classed

among the Aleutian Islands, which are said to be included under two governmental districts by the Russians, the Commander Islands belonging to the western of these districts (p. 38). Gruvens also states that the name Aleutian Islands was first applied to Copper and Bering Islands.

In many Maps examined among those noted in the lists with regard to the nomenclature of Bering Sea, and running from 1784 to about 1830, the title Aleutian Islands is so placed as impliedly to include the Commander Islands, in some it is restricted to a portion of the chain now recognized by that name. See particularly for first-mentioned usage, Map of America by A. Arrowsmith, 1804 (Brit. Mus. Lib. Cat. No. 69810, 15).

From the diversity in usage in respect to the name of the Aleutian Islands, though these are now commonly considered to end to the westward at Attou Island, it is obvious that, in defining a general boundary between the Russian and United States' possessions, it might have given rise to grave subsequent doubts and questions to have stated merely that the whole of the Aleutian Islands belonged to the United States. Neither would this have covered the case offered by the various scattered islands to the north of the Aleutian chain proper, while to have enumerated the various islands which often appeared and still sometimes appear on different Maps under alternative names would have been perplexing and unsatisfactory, from the very great number of these to be found in and about Bering Sea. It was thus entirely natural to define conventionally a general line of division fixed by astronomical positions, and so drawn as according to the best published Maps to avoid touching any known islands.

This is the more obvious, when it is borne in mind that many of the islands in and about Bering Sea are even at the present day very imperfectly surveyed, and more or less uncertain in position.

Thus, even the latest United States' Charts of what are now known as the Aleutian Islands (No. 68, published in 1891) are credited chiefly to the "North Pacific Surveying Expedition" under Rogers, which was carried out in the schooner "Fenimore Cooper" in 1855. On

sheet 1 of the Map just referred to (embracing the western part of the Aleutian Islands), such notes as the following are found:—

"The latest Russian Charts place Bouldyr Island 10 miles due south of the position given here, which is from a determination by Sumner's method.

"The low islands between Garoloi and Soulakh, excepting the west point of Unalga, are from Russian authorities, which, however, are widely discrepant."

Similarly, in the corresponding British Admiralty Chart (No. 1501) published in 1890 we find the remark:—

"Mostly from old and imperfect British, Russian, and American surveys."

Again, even on the latest Chart of Bering Sea, published by the United States in 1891, a small islet is shown north of St. Matthew Island, near the centre of the sea, which does not appear on the special Map of St. Matthew Island published in 1875, and which could not be found in 1891.

That the line drawn through Bering Sea between Russian and United States' possessions was thus intended and regarded merely as a ready and definite mode of defining which of the numerous islands in a partially explored sea should belong to either Power, is further shown by a consideration of the northern portion of the same line, which is that first defined in the Treaty. From the initial point in Bering Strait, which is carefully described, the "western limit" of territories ceded to the United States is said to proceed due north "without limitation into the same Frozen Ocean."

The "geographical limit" in this part of its length runs across an *ocean* which had at no time been surrounded by Russian territory, and which had never been claimed as reserved by Russia in any way. To which, on the contrary, special stipulations for access had been made in connection with the Anglo-Russian Convention of 1825, and which since 1848 or 1849 has been frequented by whalers and walrus-hunters of various nations, while no single fur-seal has ever been found within it. It is therefore very clear that the geographical limit thus projected could have been intended only to define the ownership of such islands, if any, as might subsequently

be discovered in this imperfectly explored ocean; and when, therefore, in the order of the Treaty, it was proceeded to define the course of "*the same western limit*" from the initial point to the southward and westward across Bering Sea, it is obvious that it continued to possess the same character and value. If intended to have a different signification in Bering Sea, and there to partition dominion over waters, it would have been necessary to specially mention and stipulate this circumstance, which was not done.

It is therefore contended that the Treaty does not purport expressly to convey any "dominion in the waters of Bering Sea," and if any dominion in said waters passed by said Treaty it must have passed as an incident or appurtenant to the territory *on* the continent and *in* the adjacent islands under the law of nations.

Letter to Mr. Tessara, August 10, 1863.

It matters not, however, so far as concerns the question of title, what Russia intended in this respect.

Russia could only transfer, as to jurisdiction and as to the seal fisheries, such rights as were hers by the rules and principles of international law.

In 1862, when Spain pushed her claim to an extended jurisdiction around the Island of Cuba, Secretary Seward's forcible response was:—

"It cannot be admitted, nor, indeed, is Mr. Tessara understood to claim, that the mere assertion of a Sovereign, by an *act of legislation*, however solemn, can have the effect to establish and fix its external maritime jurisdiction. . . . . He cannot, by a mere Decree, extend the limit and fix it at 6 miles, because, if he could, he could in the same manner, and upon motives of interest, ambition, and even upon caprice, fix it at 10, or 20, or 50 miles, without the consent or acquiescence of other Powers which have a common right with himself in the freedom of all the oceans. Such a pretension could never be successfully or rightfully maintained."

That no extraordinary rights were in contemplation either before, at the time of, or for years after the Treaty of Cession is abundantly proved.

Debates in Congress, touching the cession by Russia of Alaska, 1867.

When the cession of Alaska was before Congress for consideration, Mr. Sumner, after a long and exhaustive speech covering the details of the property about to be acquired by the United States, did not in any way touch upon nor suggest exclusive claims to coastal waters 100 miles from land, nor upon special property existing in seals. He did, however, remark:

"No sea is now *mare clausum*, and all of these (whales) may be pursued by a ship under any flag except directly on the coast or within its territorial limit."

In view of the present contention, it is of interest to read the Report of the discussion which took place in Congress upon the value of the proposed purchase and the nature of the interests and property.

The debate was protracted, and many leading Members of Congress spoke at length. To none of them apparently did it occur that a special property in seals was involved. No one suggested the existence of an exclusive jurisdiction over coastal waters distant more than 3 miles from land.

Mr. Washburn, of Wisconsin, said:—

United States' Congressional Debates, from "Congressional Globe," December 11, 1867, Part I, p. 138, 40th Cong., 2nd Sess.

"But, Sir, there has never been a day since Vitus Behring sighted that coast until the present when the people of all nations have not been allowed to fish there, and to cure fish so far as they can be cured in a country where they have only from forty-five to sixty pleasant days in the whole year. England, whose relations with Russia are far less friendly than ours, has a Treaty with [illegible] Government by which British subjects are allowed to fish and cure fish on that coast. Nay, more, she has a Treaty giving her subjects for ever the free navigation of the rivers of Russian America, and making Sitka a free port to the commerce of Great Britain."

Mr. Ferriss said:—

United States' Congressional Debates, from "Congressional Globe," July 1, 1868, Part IV, p. 3667, 40th Cong., 2nd Sess.

"That extensive fishing banks exist in these northern seas is quite certain; but what exclusive title do we get to them? They are said to be far out at sea, and nowhere within 3 marine leagues of the islands or main shore."

Mr. Peters, during the course of his speech, remarks:—

"I believe that all the evidence upon the subject proves the proposition of Alaska's worthlessness to be true. Of course, I would not deny that her cod fisheries, if she has them, would be somewhat valuable; but it seems doubtful if fish can find sun enough to be cured on her shores, and if even that is so, my friend from Wisconsin (Mr. Washburn) shows pretty conclusively that in existing Treaties we had that right already."

Mr. Williams, during his speech on purchase of Alaska, in speaking of the value of the fishes, says:—

United States' Congressional Debates, from Appendix to "Congressional Globe," July 9, 1868, Part V, 2nd Sess., 40th Cong., p. 490.

"And now as to the fishes, which may be called, I suppose, the *argumentum piscatorium*, . . . or is it the larger tenants of the ocean, the more gigantic game, from the

whale, the seal, and walrus, down to the halibut and cod, of which it is intended to open pursuit to the adventurous fishermen of the Atlantic coast, who are there already in a domain that is free to all? My venerable colleague (Mr. Stevens), who discourses as though he were a true brother of the angle himself, finds the foundations of this great Republic like those of Venice or Genoa among the fishermen. Beautiful as it shows above, like the fabled mermaid—'*desimit in piscem mulier formosa superne*,' it ends, according to him, as does the Alaska argument itself, in nothing but a fish at last. But the resources of the Atlantic are now, he says, exhausted. The Falkland Islands are now only a resting place in our maritime career, and American liberty can no longer live except by giving to its founders a wider range upon a vaster sea. Think of it, he exclaims—I do not quote his precise language—what a burning shame, is it not, to us that we have not a spot of earth in all that watery domain on which to refit a mast or sail, or dry a net or fish?—forgetting, all the while, that we have the range of those seas without the leave of anybody; that the privilege of landing anywhere was just as readily attainable, if wanted, as that of hunting on the territory by the British; and, above all, that according to the official Report of Captain Howard, no fishing bank has been discovered within the Russian latitudes."

Mr. Howe:—

"Mr. President, everybody but myself, or at least a large majority of the Senate, seems to know not only what is in this Bill, but to be entirely satisfied that it is the best Bill that could be framed. As I said once before, it seems to be framed on the principle that Government owns that property — these seals. I wish some Senator would tell me what other possession, what other property, what other value of any amount the Government has, or ever had, that the law authorized a single Agent of the Government to sell upon his own terms, to pick out his purchases, and to fix the terms. Does this Bill authorize the Secretary of the Secretary of the Treasury to dispose of this possession?"

United States' Congressional Debates, from "Congressional Globe," June 30, 1870, Part VI, 2nd Sess., 41st Cong., p. 5032.

Mr. Boutwell, as already stated, was Secretary of the United States' Treasury when the legislation of Congress was adopted for the organization of the Alaskan territories and the government and leasing of the seal islands.

The following correspondence shows the position assumed in 1872 by the Treasury Department in relation to the extent of jurisdiction of the United States in Alaska waters:—

"*Mr. Phelps to Mr. Boutwell.*

"*Customs House, San Francisco,*

"Sir, "*Collector's Office, March* 25, 1872.

"I deem it proper to call the attention of the Department to certain rumours which appear to be well

authenticated, the substance of which appears in the printed slip taken from the 'Daily Chronicle' of this date, herewith inclosed.

"In addition to the several schemes mentioned in this paper, information has come to this office of another which is being organized at the Hawaiian Islands for the same purpose. It is well known that, during the month of May and the early part of June in each year, the fur-seal, in their migration from the southward to St. Paul and St. George Islands, uniformly move through Ounimak Pass in large numbers, and also through the narrow straits near that pass which separate several small islands from the Aleutian group.

"The object of these several expeditions is unquestionably to intercept the fur-seals at these narrow passages during the period above mentioned, and there, by means of small boats manned by skilful Indians or Aleutian hunters, make indiscriminate slaughter of those animals in the water, after the manner of hunting sea-otters.

"The evil to be apprehended from such proceedings is not so much in respect of the loss resulting from the destruction of the seals at those places (although the killing of each female is in effect the destruction of two seals), but the danger lies in diverting these animals from their accustomed course to the Islands of St. Paul and St. George, their only haunts in the United States.

"It is believed by those who have made the peculiar nature and habits of these animals a study, that if they are by any means seriously diverted from the line upon which they have been accustomed to move northward in their passage to these islands, there is great danger of their seeking other haunts, and should this occur the natural selection would be Komandorski Islands, which lie just opposite the Pribyloff group, near the coast of Kamschatka, owned by Russia, and are now the haunts of fur-seals.

"That the successful prosecution of the above-mentioned schemes would have the effect to drive the seals from their accustomed course there can be no doubt. Considering, therefore, alone the danger which is here threatened to the interest of the Government in the seal fisheries, and the large annual revenue derived from the same, I have the honour to suggest, for the consideration of the Honourable Secretary of the Treasury, the question whether the Act of the 1st July, 1870, relating to those fisheries, does not authorize his interference by means of revenue cutters to prevent foreigners and others from doing such an irreparable mischief to this valuable interest Should the Honourable Secretary deem it expedient to send a cutter into these waters, I would respectfully suggest that a steam-cutter would be able to render the most efficient service, and that it should be in the region of Ounimak Pass and St. Paul and St. George Islands by the 15th of next May.

"I am, &c.

(Signed) "T. G. PHELPS, *Collector.*

"*Extract from San Francisco 'Daily Chronicle,'*
March 21, 1872.

"It is stated in reliable commercial circles that parties in Australia are preparing to fit out an expedition for the capture of fur-seals in Behring Sea. The present high prices of fur-seal furs in London and the European markets has acted powerfully in stimulating enterprises of a like character. But a few days ago we mentioned that a Victorian Company was organized for catching fur-seals in the North Pacific. Another party—an agent representing some Eastern capitalists—has been in this city for the past week making inquiries as to the feasibility of organizing an expedition for like purposes.

"*Mr. Boutwell to Mr. Phelps.*

"*Treasury Department, Washington, D.C.,*
"*April* 19, 1872.

"Sir,

"Your letter of the 25th ultimo was duly received, calling the attention of the Department to certain rumours circulating in San Francisco, to the effect that expeditions are to start from Australia and the Hawaiian Islands to take fur-seals on their annual migration to the Islands of St. Paul and St. George through the narrow Pass of Ounimak. You recommend—to cut off the possibility of evil resulting to the interests of the United States from these expeditions—that a revenue cutter be sent to the region of Ounimak Pass by the 15th May next.

"A very full conversation was had with Captain Bryant upon this subject while he was at the Department, and he conceived it to be entirely impracticable to make such an expedition a paying one, inasmuch as the seals go singly or in pairs, and not in droves, and cover a large region of water in their homeward travel to these islands, and he did not seem to fear that the seals would be driven from their accustomed resorts, even were such attempts made.

"In addition, I do not see that the United States would have the jurisdiction or power to drive off parties going up there for that purpose, unless they made such attempt within a marine league of the shore.

"As at present advised, I do not think it expedient to carry out your suggestions, but I will thank you to communicate to the Department any further facts or information you may be able to gather upon the subject.

"I am, &c.

(Signed) "GEORGE S. BOUTWELL,
Secretary."

The rules and principles of International Law.

The claim of Russia was, moreover, in the teeth of the law of nations as understood in 1821 or in 1892.

By the law of nations, municipal territorial jurisdiction on the sea is limited to 3 miles or 1 marine league from the shore.

In the brief filed in the Court at Sitka by the counsel for the United States' Government in 1886, the following passage occurs:—

"*The 3-mile Limit.*

"Concerning the doctrine of international law establishing what is known as the marine league belt, which extends the jurisdiction of a nation into adjacent seas for a distance of 1 marine league or 3 miles from its shores, and following all the indentations and sinuosities of its coast, there is at this day no room for discussion. It must be accepted as the settled law of nations. It is sustained by the highest authorities, law-writers and jurists. It has been sanctioned by the United States since the foundation of the Government. It was affirmed by Mr. Jefferson, Secretary of State, as early as 1793, and has been reaffirmed by his successors—Mr. Pickering, in 1796; Mr. Madison, in 1807; Mr. Webster, in 1842; Mr. Buchanan, in 1849; Mr. Seward, in 1862, 1863, and 1864; Mr. Fish, in 1875; Mr. Evarts, in 1879 and 1881; and Mr. Bayard, in 1886. (Wheaton's 'International Law,' vol. i, sec. 32, pp. 100 and 109.)

"Sanctioned thus by an unbroken line of precedents covering the first century of our national existence, the United States would not abandon this doctrine if they could; they could not if they would."

Wharton's "Digest," p. 100.

Mr. Jefferson, Secretary of State, wrote to the Minister for Great Britain in 1793:—

"The limit of our sea league from shore is provisionally adopted as that of the territorial sea of the United States."

In 1794, in a Treaty between Great Britain and the United States of America, there was a recognition of the limit of maritime jurisdiction. Article XXV laid it down that:—

"Neither of the said parties shall permit the ships or goods belonging to the subjects or citizens of the other to be taken within cannon-shot of the coast, nor in any of the bays, ports, or rivers of their territories by ships of war," &c.

The Congress of the United States in the same year (Cap. 226, approved the 5th June, 1794) enacted that:—

"The District Courts shall take cognizance of complaints, by whomsoever instituted, in cases of captures made within the waters of the United States, or within 1 marine league of the coasts or shores thereof."

Again, in 1819, when Great Britain and the United States of America were settling their

fishery rights, the United States renounced all claim to "take dry or cure fish on or within 3 marine miles of the coast, bays, or harbours of His Britannic Majesty's dominion in America."

"State Papers," vol. xx, 1832, p. 350.

On the 10th July, 1832, the United States' Chargé d'Affaires at Buenos Ayres, writing to the Buenos Ayres Foreign Minister on the question of the seal fishery at the Falkland Islands, says:—

"The ocean fishery is a natural right which all nations may enjoy in common. Every interference with it by a foreign Power is a national wrong. When it is carried on within the marine league of the coast which has been designated as the extent of the national jurisdiction, reason seems to dictate a restriction; if, under the pretext of carrying on the fishery, an evasion of the revenue laws of the country may reasonably be apprehended, or any other serious injury to the Sovereign of the coast, he has a right to prohibit it; but as such prohibition derogates from a natural right, the evil to be apprehended ought to be a real, not an imaginary, one."

Article IX in the Convention between Great Britain and France (2nd August, 1839), a Treaty for the purpose of defining the limits of the exclusive right of fishery, provides:—

"The subjects of Her Britannic Majesty shall enjoy the exclusive right of fishery within the distance of 3 miles from low-water mark along the whole extent of the coasts of the British Islands," &c.

Article X provides that these miles shall be geographical miles, whereof sixty make a degree of latitude.

Mr. Webster, in 1842, writes to Lord Ashburton:—

"A vessel on the high seas beyond the distance of 1 marine league from the shore is regarded as part of the territory of the nation to which she belongs, and subjected exclusively to the jurisdiction of that nation."

Mr. Buchanan, Secretary of State, 1849, wrote (Wharton's "Digest," p. 101):—

"The exclusive jurisdiction of a nation extends to the ports, harbours, bays, mouths of rivers, and adjacent parts of sea inclosed by headlands, and also to the distance of 1 marine league, or so far as a cannon-shot will reach from the shore along all its coasts. Within these limits the Sovereign of the mainland may arrest, by due process of law, alleged offenders on board of foreign merchant-ships."

Wharton, in his "Digest of the International Law of the United States," 1886,

section 32, vol. i, p. 102, citing MS. notes, Spain, prints portions of a letter from Mr. Seward, Secretary of State, to Mr. Tassara on the 16th December, 1862, where, in connection with the maxim, "*Terræ dominium finitur ubi finitur armorum vis*," he lays down that—

"The range of a cannon-ball is shorter or longer according to the circumstances of projection, and it must be always liable to change with the improvement of the science of ordnance. Such uncertainty upon a point of jurisdiction or sovereignty would be productive of many and endless controversies and conflicts. A more practical limit of national jurisdiction upon the high seas was indispensably necessary, and this was found as the Undersigned (Mr. Secretary Seward) thinks in fixing the limit at 3 miles from the coast. This limit was early proposed by the publicists of all maritime nations. While it is not insisted that all nations have accepted or acquiesced and bound themselves to abide by this rule when applied to themselves, yet these points involved in the subject are insisted upon by the United States: (1) that this limit has been generally recognized by nations; (2) that no other general rule has been accepted; and (3) that, if any State has succeeded in fixing a larger limit, this has been done by the exercise of maritime power, and constitutes an exception to the general understanding which fixes the range of a cannon-shot (when it is made the test of territorial jurisdiction) at 3 miles. So generally is this rule accepted, that writers commonly use the expressions of a range of cannon-shot and 3 miles as equivalents of each other. In other cases, they use the latter expression as a substitute for the former."

In the brief of the United States' counsel at Sitka in 1886, already referred to, it is said:—

"It thus appears that our Government asserted this doctrine in its infancy. It was announced by Mr. Jefferson as Secretary of State and by the Attorney-General in 1793. Mr. Pickering, Secretary of State in 1796, reaffirms it in his letter to the Governor of Virginia, in the following language: 'Our jurisdiction has been fixed to extend 3 geographical miles from our shores, with the exception of any waters or bays which are so land-locked as to be unquestionably within the jurisdiction of the States, be their extent what they may.' (Wheaton's 'International Law,' vol. i, sec. 32, pp. 2–100.)

"Mr. Buchanan, Secretary of State, to Mr. Jordan, in 1849, reiterates this rule in the following language: 'The exclusive jurisdiction of a nation extends to the ports, harbours, bays, mouths of rivers, and adjacent parts of the sea inclosed by headlands.' (Idem, p. 101.)

"Mr. Seward, in the Senate in 1852, substantially enunciates the same doctrine by declaring that, if we relied alone upon the old rule that only those bays whose entrance from headland to headland do not exceed 6 miles

are within the territorial jurisdiction of the adjoining nation, our dominion to all the larger and more important arms of the sea on both our Atlantic and Pacific coasts would have to be surrendered. Our right to jurisdiction over these rests with the rule of international law which gives a nation jurisdiction over waters embraced within its land dominion."

The American publicist, Wheaton, p. 320, thus states the rule of international law :—

"Maritime territory of every State extends to the ports, harbours, bays, mouths of rivers, and adjacent parts of the sea inclosed by headlands belonging to the same State. The general usage of nations superadds to this extent of territorial jurisdiction a distance of 1 marine league, or as far as a cannon-shot will reach, from the shore along all the coasts of the State. Within this territory its rights of property and territorial jurisdiction are absolute, and exclude those of every other nation."

It is true that, by the British "Hovering Act" of 1736, and similar legislation in the United States for certain revenue purposes, a jurisdiction of 4 leagues from the coasts is assumed. Mr. Wheaton states in his text (p. 323) that these laws have been declared, by judicial authority in each country, to be consistent with the law and usage of nations; but Mr. Dana, in his note, section 179, says :—

"The statement in the text requires further consideration. It has been said that the consent of nations extends the territoriality of a State to 1 marine league or cannon-shot from the coast. Acts done within this distance are within the Sovereign authority. The war-right of visit and search extends over the whole sea, but it will not be found that any consent of nations can be shown in favour of extending what may be strictly called territoriality for any purposes whatever beyond the marine league or cannon-shot. Doubtless, States have made laws for revenue purposes touching acts done beyond territorial waters, but it will not be found that in later times the right to make seizures beyond such waters has been insisted upon against the remonstrance of other States, or that a clear and unequivocal judicial precedent now stands, sustaining such seizures, when the question of jurisdiction has been presented. The revenue laws of the United States, for instance, provide that if a vessel bound to a port in the United States shall (except from necessity) unload cargo within 4 leagues from the coast, and before coming to the proper port for entry and unloading, and receiving permission to do so, the cargo is forfeited, and the master incurs a penalty (Act of 2nd March, 1797, section 27). But the Statute does not authorize the seizure of a foreign vessel when beyond her territorial jurisdiction."

Mr. Lawrence, in his note to the same text in Wheaton, says :—

"It has been shown (note, p. 226), referring to visitation in time of peace, that no apprehended inconvenience on account of the revenue laws or the public safety would give a right to a ship of war to stop a merchantman belonging to another country, even near the coast, beyond 1 marine league. So far as there is any interference allowed under the Hovering Acts with foreign vessels, it is exclusively through the comity of the Power to which the vessels belong."

Mr. Fish, Secretary of State, wrote to Sir Edward Thornton on the 22nd January, 1875 (Wharton's "Digest," p. 105) :—

"The instruction from the Foreign Office to Mr. Watson of the 25th September last, a copy of which was communicated by that gentleman to this Department in his note of the 17th October, directs him to ascertain the views of this Government in regard to the extent of maritime jurisdiction which can properly be claimed by any Power, and whether we have ever recognized the claim of Spain to a 6-mile limit, or have ever protested against such claim.

"In reply, I have the honour to inform you that this Government has uniformly, under every Administration which has had occasion to consider the subject, objected to the pretension of Spain adverted to, upon the same ground and in similar terms to those contained in the instruction of the Earl of Derby.

"We have always understood and asserted that, pursuant to public law, no nation can rightfully claim jurisdiction at sea beyond 1 marine league from its coast.

"This opinion on our part has sometimes been said to be inconsistent with the facts, that by the laws of the United States revenue cutters are authorized to board vessels anywhere within 4 leagues of their coasts, and that, by the Treaty of Guadalupe Hidalgo, so called, between the United States and Mexico, of the 2nd February, 1848, the boundary-line between the dominions of the parties begins in the Gulf of Mexico 3 leagues from land.

"It is believed, however, that in carrying into effect the authority conferred by the Act of Congress referred to, no vessel is boarded, if boarded at all, except such a one as, upon being hailed, may have answered that she was bound to a port of the United States. At all events, although the Act of Congress was passed in the infancy of this Government, there is no known instance of any complaint on the part of a foreign Government of the trespass by a commander of a revenue cutter upon the rights of its flag under the law of nations.

"In respect to the provision in the Treaty with Mexico, it may be remarked that it was probably suggested by the passage in the Act of Congress referred to, and designed for the same purpose, that of preventing smuggling. By turning to the files of your Legation you will find that

Mr. Bankhead, in a note to Mr. Buchanan of the 30th April, 1848, objected, on behalf of Her Majesty's Government, to the provision in question. Mr. Buchanan, however, replied, in a note of the 19th August in that year, that the stipulation could only affect the rights of Mexico and the United States, and was never intended to trench upon the rights of Great Britain, or of any other Power, under the law of nations."

Mr. Fish, Secretary of State, wrote to the United States' Legation in Russia on the 1st December, 1875 (Wharton's "Digest," p. 106):—

"There was reason to hope that the practice, which formerly prevailed with powerful nations, of regarding seas and bays, usually of large extent near their coast, as closed to any foreign commerce or fishery not specially licensed by them, was, without exception, a pretension of the past, and that no nation would claim exemption from the general rule of public law, which limits its maritime jurisdiction to 1 marine league from its coast. We should particularly regret if Russia should insist on any such pretension."

Dealing with the principle apparently put forward in Point 1 of this Convention, Mr. Seward, Secretary of State, writing to Mr. Tassara, 10th August, 1863:—

"Nevertheless, it cannot be admitted, nor, indeed, is Mr. Tassara understood to claim, that the mere assertion of a Sovereign by an act of legislation, however solemn, can have the effect to establish and fix its external maritime jurisdiction. His right to a jurisdiction of 3 miles is derived not from his own decree, but from the law of nations, and exists even though he may never have proclaimed or asserted it by any decree or declaration whatsoever. He cannot, by a mere decree, extend the limit and fix it at 6 miles, because, if he could, he could in the same manner and upon motives of interest, ambition, or even upon caprice, fix it at 10, or 20, or 50 miles, without the consent or acquiescence of other Powers which have a common right with himself in the freedom of all the oceans. Such a pretension could never be successfully or rightfully maintained." Wharton's "Digest," p. 103.

The opinion of Lord Stowell, in the case of "Le Louis" (2 Dodson's Admiralty Reports, 210), may be referred to. There a French vessel, fitted out for the Slave Trade, and destined on a voyage to the coast of Africa and back to Martinique, was captured on the high seas by an English cutter and carried to Sierra Leone, an English Colony. She was proceeded against in the Vice-Admiralty Court of that Colony, upon a libel alleging that the captors English and American decisions.

were duly commissioned under Act of Parliament to make seizure; that the seizure was within the jurisdiction of the Court (it was, in fact, made 10 or 12 leagues off shore); that she was fitted out, manned, and navigated for the purpose of carrying on the African Slave Trade; and that she was engaged in the Slave Trade, contrary to the laws of France and the laws of nations, and could derive no protection from the French or any other flag. There was no doubt that the Slave Trade anywhere was prohibited by Act of Parliament, and the Commission of the captor to seize was duly proved.

It was claimed on the part of the prosecution that, while admitting that the Courts of one country are not authorized to take cognizance of breaches of the mere municipal laws of another, yet that this was a case of a very different description, for here the Court was proceeding on a breach of a general law, and only looked to the law of the particular country of the vessel to see whether it afforded any protection to the offender; and it was urged to be most reasonable that the slave-dealer should be restrained by foreign cruizers, as well as by those of their own country; otherwise, an abolition in which all the great Powers of Europe had joined might be rendered perfectly illusory by the act of the pettiest State in the world, and peace in Europe would only be the signal for war in Africa.

But Mr. Lushington, for the owners, urged that the place of capture was as much removed from the local jurisdiction of Great Britain as the middle of the Baltic Sea or the Atlantic Ocean, and that the claim of the Government amounted to this—that there existed a right of search during peace. If such a right existed at all, it must be founded on public law, or upon express Treaty; if upon public law, the right must be shown necessarily to arise from some principle admitting of no dispute.

Such being the case, and the opposing contentions presented, Lord Stowell, in his opinion, declared (p. 243):—

"Upon the first question, whether the right of search exists in time of peace, I have to observe that two principles of public law are generally recognized as fundamental. One is the perfect equality and entire independence of all distinct States. Relative magnitude creates no distinction of right; relative imbecility, whether permanent or casual, gives no additional right to the more

powerful neighbour, and any advantage seized upon that ground is mere usurpation. This is the great foundation of public law which it mainly concerns the peace of mankind both in their politic and private capacities to preserve inviolate. The second is, that all nations being equal, all have an equal right to the uninterrupted use of the unappropriated parts of the ocean for their navigation. In places where no local authority exists, where the subjects of all States meet upon a footing of entire equality and independence, no one State or any of its subjects has a right to assume or exercise authority over the subjects of another. I can find no authority that gives the right of interruption to the navigation of States in amity upon the high seas excepting that which the rights of war give to both belligerents against neutrals."

After showing how piracy, being an offence against all nations and the law of nations, was punishable anywhere, he says :—

"It is true that wild claims have been occasionally set up by nations, particularly those of Spain and Portugal, in the East and West Indian seas; but these are claims of a nature quite foreign to the present question, being claims not of a general right of visitation and search upon the high seas unappropriated, but extravagant claims to the appropriation of particular seas founded upon some grounds of a pretended authority, or upon some ancient, exclusive usurpation.

"But unless slavery could be pronounced as legal piracy, some new ground must be assumed on which the right of seizure claimed could be supported; that Slave Trade was not piracy, nor was it unquestionably and legally criminal by the universal law of nations; that the Court must conform to the judgment of the law upon the subject, and acting as a Court in the administration of law it cannot attribute criminality to an act while the law imputes none; that it must look to the legal standard of morality, and upon a question of this nature that standard must be found in the law of nations as fixed by general and ancient and admitted practices by Treaties, and by the general tenour of the laws and ordinances, and the formal transactions of civilized States, and looking to those authorities he found it difficult to maintain that the traffic in slaves was legally criminal; that the law of nations had not declared the Slave Trade to be unlawful or criminal."

And after referring to the enormity of the traffic, and to the extreme utility and necessity of its suppression and the difficulty of such suppression, unless such seizures were held to be authorized, he concludes :—

"But the difficulty of the attainment will not legalize measures that are otherwise illegal. To press forward to a great principle by breaking through every other great principle that stands in the way of its establishment, to

force the way to the liberation of *Africa* by trampling upon the independence of other States in *Europe*, in short, to procure an eminent good by means that are unlawful, is as little consonant to private morality as to public justice. Obtain the concurrence of other nations if you can by application, by remonstrance, by example, by every peaceable instrument which man can employ to attract the consent of man, but a nation is not justified in assuming rights that do not belong to her merely because she means to apply them to a laudable purpose, nor in setting out upon a moral crusade of converting other nations by acts of unlawful force, nor is it to be argued that because other nations approve the ultimate purpose they must, therefore, submit to every measure which any one State or its subjects may inconsiderately adopt for its attainment. . . .

"If it [the exercise of the right of seizure] be assumed by force and left at large to operate reciprocally upon the ships of every State (for it must be a right of all against all), without any other limits as to time, place, or mode of inquiry, then such is the pretence in each instance as particular States or their individual subjects may impose, I leave the tragedy contained in this case to illustrate the effects that are likely to arise in the very first stages of the process without adding to the account what must be considered as a most awful part of it, the perpetual irritation and the universal hostility which are likely to ensue."

10 Wheaton, 66.

The decision of the Supreme Court of the United States in the case of the "Antelope" is to the same effect. There Chief Justice Marshall delivered the opinion of the Court, holding that the Slave Trade, though contrary to the law of nature, was not in conflict with the law of nations:—

"No principle of general law is more universally acknowledged than the perfect equality of nations. Russia and Geneva have equal rights. It results from this equality that no one can rightfully impose a rule on another; each legislates for itself, but its legislation can operate on itself alone. A right, then, which is vested in all by the consent of all, can be divested only by consent; and this trade, in which all have participated, must remain lawful to those who cannot be induced to relinquish it. As no nation can prescribe a rule for others, none can make a law of nations, and this traffic remains lawful to those whose Governments have not forbidden it.

"If it is consistent with the law of nations, it cannot, in itself, be piracy. It can be made so only by Statute, and the obligation of the Statute cannot transcend the legislative power of the State which may enact it.

"If it be neither repugnant to the law of nations nor piracy, it is almost superfluous to say in this Court that the right of bringing in for adjudication in time of peace, even where the vessel belongs to a nation which has

prohibited the trade, cannot exist. The Courts of no country execute the penal laws of another, and the course of the American Government on the subject of visitation and search would decide any case in which that right had been exercised by an American cruizer on the vessel of a foreign nation not violating our municipal laws against the captors.

"It follows that a foreign vessel engaged in the African Slave Trade, captured on the high seas in time of peace by an American cruizer and brought in for adjudication, would be restored."

The whole subject is fully disposed of in Mr. Dana's note No. 108 to Wheaton (p. 258), where it is said of Chief Justice Marshall, in Church against Hubbard, 2 Cranch, 187:—

"It is true that Chief Justice Marshall admitted the right of a nation to secure itself against intended violations of its laws by seizures made within reasonable limits, as to which, he said, nations must exercise comity and concession and the exact extent of which was not settled, and in the case before the Court the 4 leagues were not treated as rendering the seizure illegal. This remark must now be treated as an unwarranted admission. . . . . It may be said that the principle is settled that municipal seizures cannot be made for any purpose beyond territorial waters. It is also settled that the limit of these waters is, in the absence of Treaty, the marine league or the cannon-shot. It cannot now be successfully maintained either that municipal visits and search may be made beyond the territorial waters for special purposes, or that there are different points of that territory for different objects; but as the line of territorial waters, if not fixed, is dependent on the unsettled range of artillery fire, and if fixed must be by an arbitrary measure, the Courts in the earlier cases were not strict as to standard of distance *where no foreign Powers intervened in the cause.* In later times, it is safe to infer that judicial as well as political Tribunals will insist on one line of marine territorial jurisdiction for the exercise of force on foreign vessels in time of peace for all purposes alike."

German official Report on stranding of "Deutschland," laid before the Reichstag January 12, 1876. Page 1.

On the 5th December, 1875, the German ship "Deutschland," on her voyage from Bremen to New York, was stranded on the Kentish Knock, 17 English nautical miles from Harwich.

The German Government were asked on the 8th December, 1875, by Her Majesty's Government, if they wished an official inquiry on the matter to be held in England.

On the 11th December the German Government assented to this course.

The inquiry took place before Mr. Rothery and Captains Harris and White, the German Government being represented by counsel.

German official Report on stranding of "Deutschland," laid before the Reichstag, January 19, 1876, page 29

The matter gave rise to an interpellation in the German Reichstag by a member named Dr. Capp, who asked for explanations on three points, the last of which was, "How comes it that disasters of this kind occurring at a distance of some 17 miles from the English coast are dealt with exclusively by the English authorities?"

Page 35.

In the debate which took place in the Reichstag, Dr. Capp called attention to the fact, that according to the law of nations maritime countries had only jurisdiction to the distance of a cannon-shot from shore, which distance was commonly interpreted as 3 English nautical miles. England, he said, had in a Statute of George II, in 1736, positively laid down this distance as 4 English miles. It did not therefore seem to be clear why England, in spite of this, had held an inquiry into a case which had occurred 17 miles from her coast, where England had nothing to say to it—on the high sea, in fact.

age 37.

Herr von Philipsborn, Privy Councillor and Director in the Prussian Foreign Office, explained in reply that in England, under the Merchant Shipping Act, the Receiver of Wrecks had the power to inquire into the circumstances of wrecks near the coast both of British and foreign vessels, but, in the case of the latter, only when the wreck occurred within 3 nautical miles of the English coast. He went on to say that it was desirable to come to an understanding with the English Government, whereby the Wreck Receivers should be empowered to inquire into cases of German wrecks occurring outside the 3-mile limit.

Pages 48–57.

Correspondence took place on this subject between the British and German Governments, which ended in authority being given by Germany for the British Wreck Receiver to deal with such cases as occurred outside the 3-mile zone. The only condition attached was that the authority was to be confined to cases where the ships or crews came to British harbours or coasts after the wreck.

The whole question, and the arrangement finally concluded, arose entirely out of the recognition by both parties of the 3-mile zone.

To the draft (dated the 22nd February, 1877) of the Law touching inquiry into maritime disasters, passed by the Reichstag, and which

was promulgated on the 27th July, 1878, are subjoined (at the foot of p. 8) the following explanatory observations :—

"Foreign vessels are bound to submit themselves to the procedure of the British authorities only in case the place of the disaster is not farther distant than 3 nautical miles from the British coast. In the year 1869, however, an agreement was come to between the North German Confederation and Great Britain, in accordance with which power is given to British authorities to take sworn testimony as to the causes of maritime disasters in cases where German ships have sustained accident beyond the 3-mile coast limit in the seas bordering the British isles, provided that the master and crew have entered British territory after the accident."

Expositions of the Law of England as to what are territorial waters, and as to the extent of jurisdiction, for any purposes, beyond low-water mark, will be found in the case of the "Franconia," decided in November, 1876, before all the Judges of England. *Queen* v. *Keyn*, L. R., 2 Exch. Div. 63.

The opinions of the different Judges were said by the Agent of the United States before the Halifax Fisheries Commission (from whose brief many of the following authorities are reproduced) to be a "repertory of nearly all the learning, ancient and modern, English, American, and Continental, which could be collected from treatises and reports." The question was whether the criminal jurisdiction of England extended to a crime committed by a foreigner on a foreign vessel, within 3 miles of the English coast.

A few citations are subjoined. Sir Robert Phillimore says :—

"Whatever may have been the claims asserted by nations in times past, and perhaps no nation has been more extravagant than England in this matter, it is at the present time an unquestionable proposition of international jurisprudence, that the high seas are of right navigable by the ships of all States. . . .

"The question as to dominion over portions of the seas inclosed within headlands or contiguous shores, such as the King's Chambers, is not now under consideration. It is enough to say that within this term 'territory' are certainly comprised the ports and harbours, and the space between the flux and reflux of the sea on the land up to the furthest point at which the tide recedes.

"With respect to the second question, the distance to which the territorial waters extend, it appears, on an examination of the authorities, that the distance has varied

(setting aside even more extravagant claims) from 100 to 3 miles, the present limit. . . . .

"The sound conclusions which result from the investigations of the authorities which have been referred to appear to me to be these:—

"The *consensus* of civilized, independent States has recognized a maritime extension of frontier to the distance of 3 miles from low-water mark, because such a frontier, or belt of water, is necessary for the defence and security of the adjacent State.

"It is for the attainment of these particular objects that a dominion has been granted over this portion of the high seas."

Lindley, J., expressed himself as follows:—

"The controversy between Grotius, in his 'Mare Liberum,' and Selden, in his 'Mare Clausum,' has been observed upon by almost every writer on international law since their day, and the result has been that, whilst the extravagant propositions contended for by each of these celebrated men have been long ago exploded, it appears to me to be now agreed, by the most esteemed writers on international law, that, subject to the right of all ships freely to navigate the high seas, every State has full power to enact and enforce what laws it thinks proper for the preservation of peace and the protection of its own interests over those parts of the high seas which adjoin its own coasts, and are within 3 miles thereof, but that beyond this limit, or, at all events, beyond the reach of artillery on its own coasts, no State has any power to legislate, save over subjects and over persons on board ships carrying its flag.

"It is conceded that, even in time of peace, the territoriality of a foreign merchant-ship, within 3 miles of the coast of any State, does not exempt that ship or its crew from the operation of those laws of that State which relate to its revenue or fisheries."

Grove, J.:—

"The proposition that a belt or zone of 3 miles of sea surrounding or washing the shores of a nation—what is termed 'territorial water'—is the property of that nation, as a river flowing through its land would be, or, if not property, is subject to its jurisdiction and law, is not in its terms of ancient date; but this defined limit, so far, at least, as a maritime country like England is concerned, is rather a restriction than an enlargement of its earlier claims, which were at one time sought to be extended to a general dominion on the seas and, subsequently, over the channels between it and other countries, or, as they were termed, the narrow seas.' The origin of the 3-mile zone appears undoubted. It was an [illegible] the range of cannon—an assumed distance at which a nation was supposed able to exercise dominion from the shore."

"The principal authorities may be conveniently arranged as follows:—

"1. Those who affirm the right, in what are generally termed 'territorial waters,' to extend, at least, to the distance at which it can be commanded from the shore, or as far as arms can protect it.

"2. Those who, assigning the same origin to the right, recognized it as being fixed at 1 marine league, or 3 geographical miles, from the shore.

"3. Those who affirm the right to be absolute, and the same as over an inland lake, or (allowing for the difference of the subject-matter) as over the land itself.

"4. Those who regard the right as qualified, and the main if not only qualification that seems to me fairly deducible from the authorities is, that there is a right of transit or passage, and, as incident thereto, possibly a right of anchorage when safety or convenience of navigation requires it, in the territorial waters, for foreign ships.

"Puffendorf, Bynkershoek, Casaregis, Mozer, Azuni, Klüber, Wheaton, Hautefeuille, and Kaltenborn, though not all placing the limit of territorial jurisdiction at the same distance from the shore, none of them fix it at a smaller distance than a cannon-shot, or as far off as arms can command it. They also give no qualification to the jurisdiction, but seem to regard it as if (having regard to the difference of land and water) it were an absolute territorial possession. Chancellor Kent seems also to recognize an exclusive dominion. Hautefeuille speaks of the power of a nation to exclude others from the parts of the sea which wash its territory, and to punish them for infraction of its laws, and this as if it were dealing with its land dominion.

"Wheaton, Calvo, Halleck, Massey, Bishop, and Manning give the limit as 1 marine league, or 3 miles. Heffter mentions this limit, but says it may be extended. Ortolan, Calvo, and Massé put the right as one of jurisdiction, and not of property, but do not limit it further than that the former writer says that the laws of police and surety are there obligatory, and Massé also writes of police jurisdiction. Bluntschli says the territorial waters are subject to the military and police authorities of the place. Faustin Helie speaks of crimes in these waters coming within the jurisdiction of the Tribunals of the land to which they belong Unless these word, 'military, police, and surety,' be taken to impose a limit, no limit to the jurisdiction of a country over its territorial waters, beyond a right of passage for foreign ships, is mentioned, as far as I could gather from the numerous authorities cited, except by Mr. Manning, who confines it (though not by words expressly negativing other rights) to fisheries, customs, harbours, lighthouses, dues, and protection of territory during war. Grotius, Ortolan, Bluntschli, Schmaltz, and Massé consider there is a right of peaceable passage for the ships of other nations, and Vattel says that it is the duty of nations to permit this, but seems to think that, as a matter of absolute right, they may prohibit it.

"Such are the conclusions of the principal publicists, most of whom are of very high authority on questions of international law.

"The result of them is to show that, as in the case of many other rights, a territorial jurisdiction over a neighbouring belt of sea had its origin in might, its limits being at first doubtful and contested, but ultimately, by a concession or comity of nations, it became fixed at what was for a long time the supposed range of a cannon-shot, viz., 3 miles' distance.

"In addition to the authority of the publicists, this 3-mile range, if not expressly recognized as an absolute boundary by international law, is yet fixed on, apparently without dispute, in Acts of Parliament, in Treaties, and in Judgments of Courts of Law in this country and America."

Brett, J., uses the following language:—

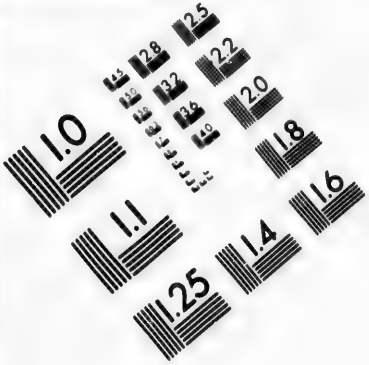
"What are the limits of the realm should, in general, be declared by Parliament. Its declaration would be conclusive, either as authority or evidence. But, in this case of the open sea, there is no such declaration; and the question is in this case necessarily left to the Judges, and to be determined on other evidence or authority. Such evidence might have consisted of proof of a continuous public claim by the Crown of England, enforced, when practicable, by arms, but not consented to by other nations. I should have considered such proof sufficient for English Judges. In England, it cannot be admitted that the limits of England depend on the consent of any other nation. But no such evidence was offered. The only evidence suggested in this case is that, by law of nations, every country bordered by the sea is to be held to have, as part of its territory (meaning thereby a territory in which its law is paramount and exclusive), the 3 miles of open sea next to its coast; and, therefore, that England, among others, has such territory. The question on both sides has been made to depend on whether such is or is not proved to be the law of nations.

"I cannot but think, therefore, that substantially all the foreign jurists are in accord in asserting that, by the common consent of all nations, each which is bordered by an open sea has over 3 adjacent miles of it a territorial right. And the sense in which they all use that term seems to me to be fully explained by Vattel (lib. i. c. 18, § 205). He says:—

"'Lorsqu'une nation s'empare d'un pays qui n'appartient encore à personne, elle est censée y occuper l'Empire, ou la souveraineté, en même temps que le domaine. Tout l'espace dans lequel une nation étend son Empire forme le ressort de sa juridiction, et s'appelle son territoire.' At lib. ii, § 84: 'L'Empire, uni au domaine, établit la juridiction de la nation dans le pays qui lui appartient, dans son territoire.'

"This seems plain: sovereignty and dominion necessarily give or import jurisdiction, and do so throughout the territory.

"Applying this to the territorial sea, at lib. i. c. 23, § 289, he says:—



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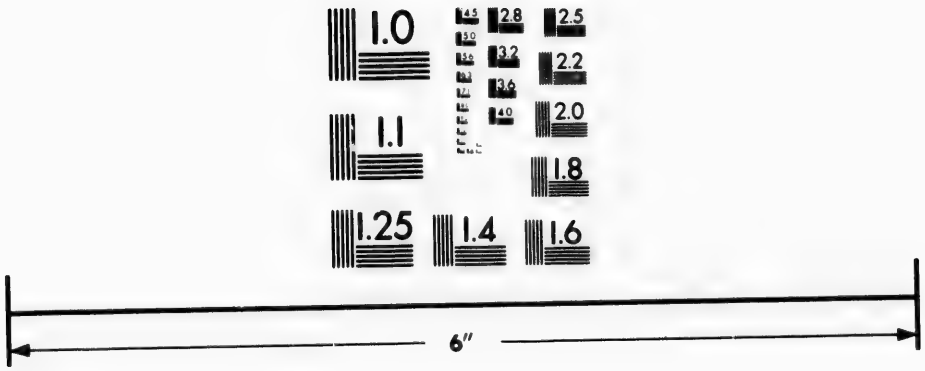

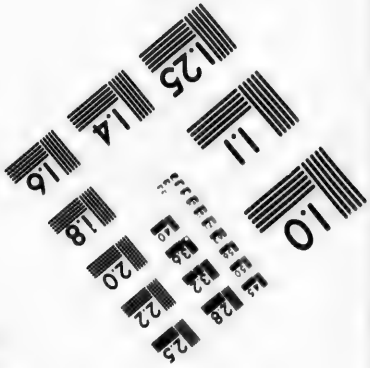

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"'Quand une nation s'empare de certaines parties de la mer, elle y occupe l'Empire aussi bien que le domaine, &c. Ces parties de la mer sont de la juridiction du territoire de la nation. Le Souverain y commande; il y donne des lois, et peut réprimer ceux qui les violent; en un mot, il y a tous les mêmes droits qui lui appartiennent sur la terre,' &c.

"It seems to me that this is, in reality, a fair representation of the accord or agreement of substantially all the foreign writers on international law; and that they all agree in asserting that, by the consent of all nations, each which is bordered by open sea has a right over such adjacent sea as a territorial sea—that is to say, as a part of its territory; and that they all mean thereby to assert that it follows, as a consequence of such sea being a part of its territory, that each such nation has, in general, the same right to legislate and to enforce its legislation over that part of the sea as it has over its land territory.

"Considering the authorities I have cited, the terms used by them,—wholly inconsistent, as it seems to me, with the idea that the adjacent country has no property, no dominion, no sovereignty, no territorial right,—and considering the necessary foundation of the admitted rights and duties of the adjacent country as to neutrality, which have always been made to depend on a right and duty as to its territory, I am of opinion that it is proved that, by the law of nations, made by the tacit consent of substantially all nations, the open sea within 3 miles of the coast is a part of the adjacent nation as much and as completely as if it were land, and a part of the territory of such nation. By the same evidence which proves this proposition, it is equally proved that every nation which possesses this water territory has agreed with all other nations that all shall have the right of free navigation to pass through such water territory, if such navigation be with an innocent or harmless intent or purpose. The right of free navigation cannot, according to ordinary principles, be withdrawn without common consent; but it by no means derogates from the sovereign authority over all its territory of the State which has agreed to grant this liberty, or easement, or right, to all the world."

Lord Chief Justice Cockburn delivered the Judgment of the Court, from which the following passages are extracted:—

"By the old common law of England, every offence was triable in the county only in which it had been committed; as, from that county alone, the 'pais,' as it was termed—in other words, the jurors by whom the fact was to be ascertained—could come. But only so much of the land of the outer coast as was uncovered by the sea was held to be within the body of the adjoining county. If an offence was committed in a bay, gulf, or estuary, *inter fauces terræ*, the common law could deal with it, because the parts of the sea so circumstanced were held to be within the body of the adjacent county or counties; but along the coast,

on the external sea, the jurisdiction of the common law extended no further than to low-water mark.

"The jurisdiction of the Admiral, however largely asserted in theory in ancient times, being abandoned as untenable, it becomes necessary for the Counsel for the Crown to have recourse to a doctrine of comparatively modern growth, namely, that a belt of sea, to a distance of 3 miles from the coast, though so far a portion of the high seas as to be still within the jurisdiction of the Admiral, is part of the territory of the realm, so as to make a foreigner in a foreign ship within such belt, though on a voyage to a foreign port, subject to our law, which it is clear he would not be on the high sea beyond such limit. It is necessary to keep the old assertion of jurisdiction and that of to-day essentially distinct; and it should be borne in mind, that it is because all proof of the actual exercise of any jurisdiction by the Admiral over foreigners in the narrow seas totally fails, that it becomes necessary to give to the 3-mile zone the character of territory, in order to make good the assertion of jurisdiction over the foreigner therein.

"Now, it may be asserted, without fear of contradiction, that the position that the sea within the belt or zone of 3 miles from the shore, as distinguished from the rest of the open sea, forms part of the realm or territory of the Crown, as a doctrine unknown to the ancient law of England, and which has never yet received the sanction of an English Criminal Court of Justice. It is true that, from an early period, the Kings of England, possessing more ships than their opposite neighbours, and being thence able to sweep the Channel, asserted the right of sovereignty over the narrow seas, as appears from the Commissions issued in the fourteenth century, of which examples are given in the 4th Institute, in the chapter on the Court of Admiralty, and others are to be found in Selden's 'Mare Clausum,' Book 2. At a later period, still more extravagant pretensions were advanced. Selden does not scruple to assert the sovereignty of the King of England over the sea as far as the shores of Norway, in which he is upheld by Lord Hale in his treatise 'De Jure Maris.' (Hargrave's Law Tracts, p. 10.)

"All these vain and extravagant pretensions have long since given way to the influence of reason and common sense. If, indeed, the sovereignty thus asserted had a existence, and could now be maintained, it would, of course, independently of any questions as to the 3-mile zone, be conclusive of the present case. But the claim to such sovereignty, at all times unfounded, has long since been abandoned. No one would now dream of asserting that the Sovereign of these realms has any greater right over the surrounding seas than the Sovereigns on the opposite shores; or that it is the especial duty and privilege of the Queen of Great Britain to keep the peace in these seas, or that the Court of Admiralty could try a foreigner for an offence committed in a foreign vessel in all parts of the Channel.

"The *concensus* of jurists, which has been so much

insisted on as authority, is perfectly unanimous as to the non-existence of any such jurisdiction. Indeed, it is because this claim of sovereignty is admitted to be untenable that it has been found necessary to resort to the theory of the 3-mile zone. It is in vain, therefore, that the ancient assertion of sovereignty over the narrow seas is invoked to give countenance to the rule now sought to be established, of jurisdiction over the 3-mile zone. If this rule is to prevail, it must be on altogether different grounds. To invoke as its foundation, or in its support, an assertion of sovereignty, which, for all practical purposes, is, and always has been, idle and unfounded, and the invalidity of which renders it necessary to have recourse to the new doctrine, involves an inconsistency on which it would be superfluous to dwell. I must confess myself unable to comprehend how, when the ancient doctrine as to sovereignty over the narrow seas is adduced, its operation can be confined to the 3-mile zone. If the argument is good for anything, it must apply to the whole of the surrounding seas. But the Counsel for the Crown evidently shrank from applying it to this extent. Such a pretension would not be admitted or endured by foreign nations. That it is out of this extravagant assertion of sovereignty that the doctrine of the 3-mile jurisdiction, asserted on the part of the Crown, and which, the older claim being necessarily abandoned, we are now called upon to consider, has sprung up, I readily admit.

"From the review of these authorities, we arrive at the following results. There can be no doubt that the suggestion of Bynkershoek, that the sea surrounding the coast to the extent of cannon-range should be treated as belonging to the State owning the coast, has, with but very few exceptions, been accepted and adopted by the publicists who have followed him during the last two centuries. But it is equally clear that, in the practical application of the rule in respect of the particular of distance, as also in the still more essential particular of the character and degree of sovereignty and dominion to be exercised, great difference of opinion and uncertainty have prevailed, and still continue to exist.

"As regards distance, while the majority of authors have adhered to the 3-mile zone, others, like M. Ortolan and Mr. Halleck, applying with greater consistency the principle on which the old doctrine rest, insist on extending the distance to the modern range of cannon—in other words, doubling it. This difference of opinion may be of little practical importance in the present instance, inasmuch as the place at which the offence occurred was within the lesser distance; but it is, nevertheless, not immaterial, as showing how unsettled this doctrine still is. The question of sovereignty, on the other hand, is all-important. And here we have every shade of opinion.

"One set of writers—as, for instance, M. Hautefeuille—ascribe to the State territorial property and sovereignty over the 3 miles of sea, to the extent of the right of excluding the ships of all other nations, even for the purpose of passage,—a doctrine flowing immediately from

the principle of territorial property, but which is too monstrous to be admitted. Another set concede territorial property and sovereignty, but make it subject to the right of other nations to use these waters for the purpose of navigation. Others, again, like M. Ortolan and M. Calvo, deny any right of territorial property, but concede 'jurisdiction;' by which I understand them to mean the power of applying the law, applicable to persons on the land, to all who are within the territorial water, and the power of legislating in respect of it, so as to bind every one who comes within the jurisdiction, whether subjects or foreigners. Some, like M. Ortolan, would confine this jurisdiction to purposes of 'safety and police;' by which I should be disposed to understand measures for the protection of the territory, and for the regulation of the navigation and the use of harbours and roadsteads, and the maintenance of order among the shipping therein, rather than the general application of the criminal law.

"Other authors—for instance, Mr. Manning—would restrict the jurisdiction to certain specified purposes in which the local State has an immediate interest; namely, the protection of its revenue and fisheries, the exacting of harbour and light dues, and the protection of its coasts in time of war.

"Some of these authors, for instance, Professor Bluntschli, make a most important distinction between a commorant and a passing ship. According to this author, while the commorant ship is liable to the local jurisdiction only in matters of 'military and police Regulations made for the safety of the territory and population of the coast,' none of these writers, it should be noted, discuss the question whether, or go the length of asserting that, a foreigner in a foreign ship, using the waters in question for the purpose of navigation solely, on its way to another country, is liable to the criminal law of the adjoining country for an offence committed on board.

"To those who assert that, to the extent of 3 miles from the coast, the sea forms part of the realm of England, the question may well be put, When did it become so? Was it so from the beginning? It certainly was not deemed to be so as to a 3-mile zone, any more than as to the rest of the high seas, at the time the Statutes of Richard II were passed. For in those Statutes a clear distinction is made between the realm and the sea, as also between the bodies of counties and the sea; the jurisdiction of the Admiral being (subject to the exception already stated as to murder and mayhem) confined strictly to the latter, and its exercise 'within the realm' prohibited in terms. The language of the first of these Statutes is especially remarkable: 'The Admirals and their deputies shall not meddle from henceforth with anything done *within the realm of England, but only with things done upon the sea.*'

"It is impossible not to be struck by the distinction here taken between the realm of England and the sea; or, when the two Statutes are taken together, not to see that the term 'realm,' used in the first Statute, and 'bodies of counties,' the term used in the second Statute, mean one

and the same thing. In these Statutes, the jurisdiction of the Admiral is restricted to the high seas, and, in respect of murder and mayhem, to the great rivers below the bridges; while whatever is within the realm—in other words, within the body of a county—is left within the domain of the common law. But there is no distinction taken between one part of the high sea and another. The 3-mile zone is no more dealt with as within the realm than the seas at large. The notion of a 3-mile zone was in those days in the womb of time. When its origin is traced, it is found to be of comparatively modern growth. . . .

"For centuries before it was thought of, the great landmarks of our judicial system had been set fast: the jurisdiction of the common law over the land, and the inland waters contained within it, forming together the realm of England; that of the Admiral over English vessels on the seas, the common property or highway of mankind.

"But to what, after all, do these ancient authorities amount? Of what avail are they towards establishing that the soil in the 3-mile zone is part of the territorial domain of the Crown? These assertions of sovereignty were manifestly based on the doctrine that the narrow seas are part of the realm of England. But that doctrine is now exploded. Who at this day would venture to affirm that the sovereignty thus asserted in those times now exists? What English lawyer is there who would not shrink from maintaining, what foreign jurist who would not deny, what foreign Government which would not repel, such a pretension? I listened carefully to see whether any such assertion would be made; but none was made. No one has gone the length of suggesting, much less of openly asserting, that the jurisdiction still exists. It seems to me to follow that, when the sovereignty and jurisdiction from which the property in the soil of the sea was inferred is gone, the territorial which was suggested to be consequent upon it must necessarily go with it.

"But we are met here by a subtle and ingenious argument. It is said that, although the doctrine of the criminal jurisdiction of the Admiral over foreigners on the four seas has died out, and can no longer be upheld, yet, as now, by the consent of other nations, sovereignty over this territorial sea is conceded to us, the jurisdiction formerly asserted may be revived and made to attach to the newly acquired domain. I am unable to adopt this reasoning. *Ex concessis*, the jurisdiction over foreigners in foreign ships never really existed; at all events, it has long been dead and buried; even the ghost of it has been laid. But it is evoked from its grave, and brought to life, for the purpose of applying it to a part of the sea which was included in the whole, as to which it is now practically admitted that it never existed. From the time the jurisdiction was asserted to the time when the pretension to it was dropped, it was asserted over this portion of the sea as part of the whole to which the jurisdiction was said to extend. If it was bad as to the whole indiscriminately, it was bad as to every part of the whole. By why was it

bad as to the whole; simply because the jurisdiction did not extend to foreigners in foreign ships on the high seas. But the waters in question have always formed part of the high seas. They are alleged in this indictment to be so now. How, then, can the Admiral have the jurisdiction over them contended for if he had it not before? There having been no new Statute conferring it, how has he acquired it?

"First, then, let us see how the matter stands as regards Treaties. It may be asserted, without fear of contradiction, that the rule that the sea surrounding the coast is to be treated as a part of the adjacent territory, so that the State shall have exclusive dominion over it, and that the law of the latter shall be generally applicable to those passing over it in the ships of other nations, has never been made the subject-matter of any Treaty, or, as matter of acknowledged right, has formed the basis of any Treaty, or has even been the subject of diplomatic discussion. It has been entirely the creation of the writers on international law. It is true that the writers who have been cited constantly refer to Treaties in support of the doctrine they assert. But when the Treaties they refer to are looked at, they will be found to relate to two subjects only—the observance of the rights and obligations of neutrality and the exclusive right of fishing. In fixing the limits to which these rights should extend, nations have so far followed the writers on international law as to adopt the 3-mile range as a convenient distance. There are several Treaties by which nations have engaged, in the event of either of them being at war with a third, to treat the sea within 3 miles of each other's coasts as neutral territory, within which no warlike operations should be carried on: instances of which will be found in the various Treaties on international law.

"Again, nations possessing opposite or neighbouring coasts, bordering on a common sea, have sometimes found it expedient to agree that the subjects of each shall exercise an exclusive right of fishing to a given distance from their own shores, and here also have accepted the 3 miles as a convenient distance. Such, for instance, are the Treaties made between this country and the United States in relation to the fishery off the coast of Newfoundland, and those between this country and France in relation to the fishery on their respective shores; and local laws have been passed to give effect to these engagements.

"But in all these Treaties this distance is adopted, not as a matter of existing right established by the general law of nations, but as matter of mutual concession and convention. Instead of upholding the doctrine contended for, the fact of these Treaties having been entered into has rather the opposite tendency; for it is obvious that, if the territorial right of a nation bordering on the sea to this portion of the adjacent waters had been established by the common assent of nations, these Treaty arrangements would have been wholly superfluous. Each nation would have been bound, independently of Treaty engagement, to

respect the neutrality of the other in these waters, as much as in its inland waters. The foreigner invading the rights of the local fishermen would have been amenable, consistently with international law, to local legislation prohibiting such infringement, without any stipulation to that effect by Treaty. For what object, then, have Treaties been resorted to? Manifestly, in order to obviate all questions as to concurrent or conflicting rights arising under the law of nations. Possibly, after these precedents and all that has been written on this subject, it may not be too much to say that, independently of Treaty, the 3-mile belt of sea might at this day be taken as belonging, for these purposes, to the local State.

"So much for Treaties. Then how stands the matter as to usage, to which reference is so frequently made by the publicists, in support of their doctrine? When the matter is looked into, the only usage found to exist is such as is connected with navigation, or with revenue, local fisheries, or neutrality; and it is to these alone that the usage relied on is confined.

"It may well be, I say again, that, after all that has been said and done in this respect, after the instances which have been mentioned of the adoption of the 3-mile distance, and the repeated assertion of this doctrine by the writers on public law, a nation which should now deal with this portion of the sea as its own, so as to make foreigners within it subject to its law, for the prevention and punishment of offences, would not be considered as infringing the rights of other nations. But I apprehend that, as the ability so to deal with these waters would result, not from any original or inherent right, but from the acquiescence of other States, some outward manifestation of the national will, in the shape of open practice or municipal legislation, so as to amount, at least constructively, to an occupation of that which was before unappropriated, would be necessary to render the foreigner, not previously amenable to our general law, subject to its control.

"And this brings me to the second branch of the argument, namely, that the jurisdiction having been asserted as to the narrow seas at the time the Statute passed, it must be taken to have been transferred by the Statute. The answer to such a contention is, that no reference being made in the Statute to this now-exploded claim of sovereignty, we must read the Statute as having transferred—as, indeed, it could alone transfer—such jurisdiction only as actually existed. Jurists are now agreed that the claim to exclusive dominion over the narrow seas, and consequent jurisdiction over foreigners for offences committed thereon, was extravagant and unfounded, and the doctrine of the 3-mile jurisdiction has taken the place of all such pretensions. In truth, though largely asserted in theory, the jurisdiction was never practically exercised in respect of foreigners.

"Hitherto, legislation, so far as relates to foreigners in foreign ships in this part of the sea, has been confined to the maintenance of neutral rights and obligations, the

prevention of breaches of the revenue and fishery laws, and, under particular circumstances, to cases of collision. In the two first, the legislation is altogether irrespective of the 3-mile distance, being founded on a totally different principle, namely, the right of a State to take all necessary measures for the protection of its territory and rights, and the prevention of any breach of its revenue laws."

Citing these decisions, the Agent for the United States, in 1877, at Halifax, remarked in his brief:—

"Such are the general principles of English law to-day as laid down by the Chief Justice of England. The jurisdiction of a State or country over its adjoining waters is limited to 3 miles from low-water mark along its sea-coast, and the same rule applies equally to bays and gulfs whose width exceeds 6 miles from headland to headland. Property in and dominion over the sea can only exist as to those portions capable of permanent possession; that is, of a possession from the land, which possession can only be maintained by artillery. At 1 mile beyond the reach of coast-guns, there is no more possession than in mid-ocean. This is the rule laid down by almost all the writers on international law, a few extracts from whom—"

The Agent proceeded to quote:—

"At present," says Vattel, "Law of Nations," Book 1, ch. xxiii, §§ 289, 291, "the whole space of the sea within cannon-shot of the coast is considered as making a part of the territory; and, for that reason, a vessel taken under the guns of a neutral fortress is not a good prize.

"All we have said of the parts of the sea near the coast may be said more particularly and with much greater reason of the roads, bays, and straits, as still more capable of being occupied, and of greater importance to the safety of the country. But I speak of the bays and straits of small extent, and not of those great parts of the sea to which these names are sometimes given—as Hudson's Bay and the Straits of Magellan—over which the Empire cannot extend, and still less a right of property. A bay whose entrance may be defended may be possessed and rendered subject to the laws of the Sovereign; and it is of importance that it should be so, since the country may be much more easily insulted in such a place than on the coast, open to the winds and the impetuosity of the waves."

Professor Bluntschli, in his "Law of Nations," Book 4, §§ 302, 309, states the rule in the same way:—

"When the frontier of a State is formed by the open sea, the part of the sea over which the State can from the shore make its power respected—i.e., a portion of the sea

extending as far as a cannon-shot from the coast—is considered as belonging to the territory of that State. Treaties or agreements can establish other and more precise limits."

Note.—The extent practised of this sovereignty has remarkably increased since the invention of far-shooting cannon. This is the consequence of the improvements made in the means of defence, of which the State makes use. The sovereignty of States over the sea extended originally only to a stone's-throw from the coast; later to an arrow-shot; fire-arms were invented, and by rapid progress we have arrived to the far-shooting cannon of the present age. But still we preserve the principle: "*Terræ dominium finitur, ubi finitur armorum vis.*"

"Within certain limits, there are submitted to the sovereignty of the bordering State:—

"(*a.*) The portion of the sea placed within a cannon-shot of the shore.

"(*b.*) Harbours.

"(*c.*) Gulfs.

"(*d.*) Roadstead."

Note.—Certain portions of the sea are so nearly joined to the *terra firma*, that, in some measure at least, they ought to form a part of the territory of the bordering State; they are considered as accessories to the *terra firma*. The safety of the State and the public quiet are so dependent on them that they cannot be contented, in certain gulfs, with the portion of the sea lying under the fire of cannon from the coast. These exceptions from the general rule of the liberty of the sea can only be made for weighty reasons, and when the extent of the arm of the sea is not large; thus, Hudson's Bay and the Gulf of Mexico evidently are a part of the open sea. No one disputes the power of England over the arm of the sea lying between the Isle of Wight and the English coast, which could not be admitted for the sea lying between England and Ireland; the English Admiralty has, however, sometimes maintained the theory of "narrow seas;" and has tried, but without success, to keep for its own interest, under the name of "King's Chambers," some considerable extents of the sea.

Klüber "Droit des Gens Modernes de l'Europe (Paris, édition 1831)," vol. i, p. 216:—

"Au territoire maritime d'un État appartiennent les districts maritimes, ou parages susceptibles d'une possession exclusive, sur lesquels l'État a acquis (par occupation ou convention) et continué la souveraineté. Sont de ce nombre: (1) les parties de l'océan qui avoisinent le territoire continental de l'État, du moins, d'après l'opinion presque généralement adoptée, autant qu'elles se trouvent sous la portée du canon qui serait placé sur le rivage; (2) les parties de l'océan qui s'étendent dans le territoire continental de l'État, si elles peuvent être gouvernées par le

canon des deux bords, ou que l'entrée seulement en peut être défendue aux vaisseaux (golfes, baies, et cales); (3) les détroits qui séparent deux continents, et qui également sont sous la portée du canon placé sur le rivage, ou dont l'entrée et la sortie peuvent être défendues (détroit, canal, bosphore, sonde). Sont encore du même nombre; (4) les golfes, détroits, et mers avoisinant le territoire continental d'un État, lesquels, quoiqu'ils ne sont pas entièrement sous la portée du canon, sont néanmoins reconnus par d autres Puissances comme mer fermée; c'est-à-dire, comme soumis à une domination, et, par conséquent, inaccessibles aux vaisseaux étrangers qui n'ont point obtenu la permission d'y naviguer."

Ortolan, in his "Diplomatie de la Mer," pp. 145, 153 (édition 1864), after laying down the rule, that a nation had control over the navigation in a strait or road whose width did not exceed 6 miles, continues:—

"On doit ranger sur la même ligne que rades, et les portes, les golfes, et les baies, et tous les enfoncements connus sous d'autres dénominations, lorsque ces enfoncements, formés par les terres d'un même État, ne dépassent pas en largeur la double portée du canon, ou lorsque l'entrée peut en être gouvernée par l'artillerie, ou qu'elle est défendue naturellement par des îles, par des bancs, ou par des roches. Dans tous ces cas, en effet, il est vrai de dire que ces golfes ou ces baies sont en la puissance de l'État maître du territoire qui les enserre. Cet État en a la possession: tous les raisonnements que nous avons fait à l'égard des rades et des ports peuvent se répéter ici. Les bords et rivages de la mer qui baigne les côtes d'un État sont les limites maritimes *naturelles* de cet État. Mais pour la protection, pour la défense plus efficace de ces limites naturelles, la coutume générale des nations, d'accord avec beaucoup de Traités publics, permettre [*sic*] tracer sur mer, à une distance convenable des côtes, et suivant leurs contours, une ligne imaginaire qui doit être considérée comme la frontière maritime artificielle. Tout bâtiment qui se trouve à terre de cette ligne est dit être *dans les eaux* de l'État dont elle limite le droit de souveraineté et de juridiction."

Hautefeuille, "Droits et Devoirs des Nations Neutres," tom. 1, tit. 1, ch. 3, § 1:—

"La mer est libre d'une manière absolue, sauf les eaux baignant les côtes, qui font partie du domaine de la nation riveraine. Les causes de cette exception sont (1) que ces portions de l'océan sont susceptibles d'une possession continue; (2) que le peuple qui les possède peut en exclure les autres; (3) qu'il a intérêt, soit pour sa sécurité, soit pour conserver les avantages qu'il tire de la mer territoriale, à prononcer cette exclusion. Ces causes connues, il est facile de poser les limites. Le domaine maritime s'arrête à l'endroit où cesse la possession

continue, où le peuple propriétaire ne peut plus exercer sa puissance, à l'endroit où il ne peut plus exclure les étrangers, enfin à l'endroit où, leur présence n'étant plus dangereuse pour sa sûreté, il n'a plus intérêt de les exclure.

"Or, le point où cessent les trois causes qui rendent la mer susceptibls de possession privée est le même : c'est la limite de la puissance, qui est représentée par les machines de guerre. Tout l'espace parcouru par les projectiles lancés du rivage, protégé et défendu par la puissance de ces machines, est territorial, et soumis au domaine du maître de la côte. La plus grande portée du canon monté à terre est donc réellement la limite de la mer territoriale.

"En effet, cet espace seul est réellement soumis à la puissance du Souverain territorial, là, mais là seulement, il peut faire respecter et exécuter ses lois ; il a la puissance de punir les infracteurs, d'exclure ceux qu'il ne peut pas admettre. Dans cette limite, la présence de vaisseaux étrangers veut menacer sa sûreté ; au delà, elle est indifférente pour lui, elle ne peut lui causer aucune inquiétude, car, au delà de la portée du canon, ils ne peuvent lui nuire. La limite de la mer territoriale est réellement, d'après le droit primitif, la portée d'un canon placé à terre.

"Le droit secondaire a sanctionné cette disposition ; la plupart des Traités qui ont parlé de cette portion de la mer ont adopté la même règle. Grotius, Hubner, Bynkershoek, Vattel, Galiani, Azuni, Klüber, et presque tous les publicistes modernes les plus justement estimés, ont pris la portée du canon comme la seule limite de la mer territoriale qui fut rationnelle et conforme aux prescriptions du droit primitif. Cette limite naturelle a été reconnue par un grand nombre de peuples, dans les lois et règlements intérieurs.

"Les côtes de la mer ne présentent pas une ligne droite et régulière ; elles sont, au contraire, presque toujours coupées de baies, de caps, &c. ; si le domaine maritime devait toujours être mesuré de chacun des points du rivage, il en résulterait de graves inconvénients. Aussi, est-on convenu, dans l'usage, de tirer une ligne fictive d'un promontoire à l'autre, et de prendre cette ligne pour point de départ de la portée du canon. Ce mode, adopté par presque tous les peuples, ne s'applique qu'aux petites baies, et non aux golfes d'une grande étendue, comme le Golfe de Gascogne, comme celui de Lyon, qui sont en réalité de grandes parties de la mer complètement ouvertes, et dont il est impossible de nier l'assimilation complète avec la haute mer."

The latest English writer, Mr. Amos, in his edition of Manning's "Law of Nations," which is praised and quoted with approval by Lord Cockburn in Queen *v.* Keyn, extends the jurisdiction of a State to the waters of bays whose width is more than 6 miles and less than 10 :—

"An obvious right enjoyed by every State equally, is

the claim to have an equal share in the enjoyment of such things as are in their nature common to all, whether from not being susceptible of appropriation, or from not having been as yet, in fact, appropriated. Such a thing, pre-eminently, is the open sea, whether treated for purposes of navigation or fishing. . . . . Nevertheless, for some limited purposes, a special right of jurisdiction, and even (for a few definite purposes) of dominion, is conceded to a State in respect of the part of the ocean immediately adjoining its own coast-line. The purposes for which this jurisdiction and dominion have been recognized are (1) the regulation of fisheries; (2) the prevention of frauds on Customs Laws; (3) the exaction of harbour and light-house dues; and (4) the protection of the territory from violation in time of war between other States. The distance from the coast-line to which this qualified privilege extends has been variously measured; the most prevalent distances being that of a cannon-shot, or of a marine league from the shore. . . . . In the case of bays, harbours, and creeks, it is a well-recognized custom, provided the opening be not more than 10 miles in width as measured from headland to headland, to take the line joining the headlands, and to measure from that the length of the distance of a cannon-shot or of a marine league. The limiting provision here introduced was rendered necessary by the great width of some of the American bays, such as the Bay of Fundy and Hudson's Bay, in respect of which questions relating especially to rights of fishing had arisen. At one time, indeed, the distance of 6 miles, in place of that of 10 miles, was contended for. It is held that, in the case of straits or narrow seas less than 6 miles in breadth, the general jurisdiction and control is equally shared by all the States the territories of which form the coast-lines; and that all the States are held bound, in times of peace at any rate, to allow a free passage at all times to the ships of war of all other States."

Marten's "Précis du Droit des Gens Modernes de l'Europe." (Pinheiro-Ferriera, Éd. Paris, 1864) §§ 40, 41 :—

"Ce qui vient d'être dit des rivières et des lacs est également applicable aux détroits de mer et aux golfes, surtout, en tant que ceux-ci ne passent la largeur ordinaire de rivières, ou la double portée d'un canon.

"De même une nation peut s'attribuer un droit exclusif sur ces parties voisines de la mer (mare proximum) susceptibles d'être maintenues du rivage. On a énoncé diverses opinions sur la distance à laquelle s'étendent les droits du maître du rivage Aujourd'hui toutes les nations de l'Europe conviennent que, dans la règle, les détroits, les golfes, la mer voisine, appartiennent au maître du rivage, pour le moins jusqu'à la portée du canon qui pourrait être placé sur le rivage.

"On verra ci-après que la pleine mer ne peut devenir l'objet d'une propriété plus ou moins exclusive, d'une part,

parce que son usage est inépuisable et innocent en lui-même, d'autre part parce que, n'étant pas de nature à être occupée, personne ne peut s'opposer à son usage ; mais de ce que la mer n'est pas susceptible de l'appropriation de l'homme, par suite de l'impossibilité pour lui de la retenir sous son obéissance, et d'en exclure les autres hommes ; et aussi, à raison de son immensité et de sa qualité d'être inépuisable, il résulte que pour les parties de l'océan qui ne réunissent pas ces conditions, pour celles qui par leur nature peuvent subir la domination de l'homme et l'exclusion des autres, pour celles, enfin, dont l'usage commun ne saurait être maintenu sans nuire à la nation intéressée, et qui sont susceptibles de propriété, le principe de la liberté s'efface et disparaît. Cela a lieu notamment pour les mers territoriales et pour les mers formées. Par l'expression de 'mers territoriales,' il faut entendre celles qui baignent les côtes d'une nation et la servent pour ainsi dire de frontière. Ces mers sont soumises à la nation maîtresse de la côte qu'elles baignent, et peuvent être réduites sous la puissance de la nation propriétaire, qui a dès lors le droit d'en exclure les autres. La possession est soutenue, entière, de même que s'il s'agissait d'un fleuve, d'un lac, ou d'une partie de territoire continental. Aussi tous les Traités reconnaissent aux nations dans un intérêt de navigation, de pêche, et aussi de défense, le droit d'imposer leurs lois dans les mers territoriales qui les bordent, de même que tous les publicistes s'accordent pour attribuer la propriété de la mer territoriale à la nation riveraine. Mais on s'est longtemps demandé quelle était l'étendue de cette partie privilégiée de la mer. Les anciens auteurs portaient très loin les limites du territoire maritime, les uns à 60 milles (c'était l'opinion générale au quatorzième siècle), les autres à 100 milles. Loccenius, 'de Jur. Marit.,' lib. v, cap. iv, § 6, parle de deux journées de chemin ; Valin, dans son 'Commentaire sur l'Ordonnance de 1681,' propose la sonde, la portée du canon, ou une distance de 2 lieues.

"D'autres auteurs ont pensé que l'étendue de la mer territoriale ne pouvait être réglée d'une manière uniforme, mais devait être proportionnée à l'importance de la nation riveraine. Au milieu de ces opinions contradictoires, il faut, suivant Hautefeuille, 'Droits et Devoirs des Nations Neutres,' 2nde édition, tome i, p. 83 et suivantes, pour fixer ces principes, remonter aux causes qui ont fait excepter de la règle de la liberté des mers, les eaux baignant les côtes, et qui les ont fait ranger dans le domaine de la nation riveraine. Ces causes étant que ces portions de la mer sont susceptibles d'une possession continue ; que le peuple qui les possède peut en exclure les autres ; enfin, qu'il a intérêt à prononcer cette exclusion, soit pour sa sécurité, soit à raison des avantages que lui procure la mer territoriale, le domaine maritime doit cesser là où cesse la possession continue, là où cessent d'atteindre les machines de guerre. En d'autres termes, la plus grande portée du canon placé à terre est la limite de la mer territoriale, *terræ potestas finitur, ubi finitur armorum vis ;* et nous devons ajouter que la plupart des Traités ont adopté cette règle·

beaucoup de peuples l'ont reconnue dans leurs lois et leurs règlements intérieurs; presque tous les publicistes l'ont regardé comme rationnelle, notamment, Grotius, Hubner, Bynkershoek, Vattel, Galiani, Azuni, Klüber.

"Au reste, le domaine maritime ne se mesure pas de chacun des points du rivage. On tire habituellement un ligne fictive d'un promontoire à l'autre, et on la prend comme point de départ de la portée du canon; cela se pratique ainsi pour les petites baies, les golfes d'une grande étendue étant assimilés à la pleine mer. La conservation du domaine de la mer territoriale par la nation riveraine n'est pas subordonnée à l'établissement et à l'entretien d'ouvrages permanents, tels que batteries ou forts; la souveraineté de la mer territoriale n'est pas plus subordonnée à son mode d'exercice que la souveraineté du territoire même.

"Ajoutons un mot sur les mers fermées, ou intérieures, qui sont les golfes, rades, baies, ou parties de la mer qui ne communiquent à l'océan que par un détroit assez resserré pour être réputées faire partie du domaine maritime de l'État maître des côtes. La qualité de mer fermée est subordonnée à une double condition: il faut, d'une part, qu'il soit impossible de pénétrer dans cette mer sans traverser la mer territoriale de l'État, et sans s'exposer à son canon; d'autre part, il faut que toutes les côtes soient soumises à la nation maîtresse du détroit.

"Mais une nation ne peut-elle acquérir un droit exclusif sur des fleuves, des détroits, des golfes trop larges pour être couverts par les canons du rivage, ou sur les parties d'une mer adjacente qui passent la portée du canon, ou même la distance de 3 lieues? Nul doute d'abord qu'un tel droit exclusif ne puisse être acquis contre une nation individuelle qui consent à le reconnaître. Cependant, il semble même que ce consentement ne soit pas un requisite essentiel pour une telle acquisition, en tant que le maître du rivage se voit en état de maintenir à l'aide du local, ou d'une flotte, et que la sûreté de ses possessions territoriales offre une raison justificative pour l'exclusion des nations étrangères. Si de telles parties de la mer sont susceptibles de domination, c'est une question de fait de savoir lesquels de ces détroits, golfes, ou mers adjacentes, situés en Europe, sont libres de domination, lesquels sont dominés (*clausa*), ou quels sont ceux sur la liberté desquels on dispute."

De Cussey. "Phases et Causes Célèbres du Droit Maritime des Nations." (Leipzig, Éd. 1856), liv. i, tit. 2, §§ 40, 41:—

"Mais la protection du territoire de l'État du côté de la mer, et la pêche, qui est la principale ressource des habitants du littoral, ont fait comprendre la nécessité de reconnaître un territoire maritime. Ou, mieux encore, une mer territoriale, dépendant de tout État Riverain de la mer; c'est-à-dire, une distance quelconque à partir de la côte, qui fut réputée la continuation du territoire, et à laquelle devait s'étendre pour tout État Maritime la souveraineté spéciale de la mer.

"Cette souveraineté s'étend aux districts et parages maritimes, tels que les rades et baies, les golfes, les détroits, dont l'entrée et la sortie peuvent être défendues par le canon.

"Tous les golfes et détroits ne sauraient appartenir, dans la totalité de leur surface ou de leur étendue, à la mer territoriale des États dont ils baignent les côtes; la souveraineté de l'État reste bornée sur les golfes et détroits d'une grande étendue à la distance qui a été indiquée au précédent paragraphe; au delà, les golfes et détroits de cette catégorie sont assimilés à la mer, et leur usage est libre pour toutes les nations."

The foregoing authorities are taken in full from the brief of the Agent of the United States for the Commission.

The brief on behalf of the British Government, in reply to this brief, did not dispute the general principle of international law which the foregoing authorities so conclusively support, but dealt with the question of the jurisdiction over those portions of a nation's adjacent waters which are included by promontories or headlands within its territories.

It dealt particularly with the width of the mouths of the bays which might be considered within the territorial limits of a country.

The British brief also raised the point that, by the Convention of 1818, United States' fishermen were prohibited from fishing within 3 marine miles of the *entrances* of any such bays, creeks, or harbours of the British dominions in America.

While there is no evidence of either an assertion (in the sense of persisting in a claim), or an exercise of exclusive maritime jurisdiction by any Power *in* Bering Sea, it is submitted that even if Russia, by the Ukase of 1821, did claim and afterwards assert exclusive jurisdiction over a coastal limit of 100 miles in that sea, such an assertion established no right or authority according to international law.

Phillimore I, § 174:—

"The right of navigation, fishing, and the like upon the open sea, being *jura meræ facultatis*, rights which do not require a continuous exercise to maintain their validity, but which may or may not be exercised according to the free will and pleasure of those entitled to them, can neither be lost by non-user or prescribed against, nor acquired to the exclusion of others by having been immemorially exercised by one nation only. No presumption can arise that those who have not hitherto exercised such rights have abandoned the intention of ever doing so."

Calvo recognizes the temptation which the proximity to the coast of "fish, oysters, and other shell-fish" affords to nations to extend their sovereignty beyond the 3-mile limit. Yet, instead of permitting such an extension, especially when supported by long use, he distinctly says:—

"De pareilles dérogations aux principes universellement reconnus ont besoin, pour devenir obligatoires, d'être sanctionnées par des Conventions expresses et écrites."

The reason which flows from the nature of prescription, however, is sufficient to establish the point in question, without the aid of authority. Unlike adverse possession or limitation, prescription rests for its validity on a presumed prior grant. Now, in international law there is no room for such a presumption. National archives are not so susceptible of oblivion and destruction as to call it into existence.

Adverse possession and limitation have no place in marine international law.

The controversy between Grotius and Selden as to the right of appropriation by a nation of the sea beyond the immediate vicinity of the coast is thus reviewed by Wheaton:—

Wheaton, Elements, § 187.

"There are only two decisive reasons applicable to the question. The first is physical and material, which would alone be sufficient, but when coupled with the second reason, which is purely moral, will be found conclusive of the whole controversy:—

"1. Those things which are originally the common property of all mankind can only become the exclusive property of a particular individual or society of men by means of possession. In order to establish the claim of a particular nation to a right of property in the sea, that nation must obtain and keep possession of it, which is impossible.

"2. In the second place, the sea is an element which belongs equally to all men, like the air. No nation, then, has the right to appropriate it, even though it might be physically possible to do so.

Cf. Ortolan, "Diplomatie de la Mer," tom. I, pp. 120-126.

"It is thus demonstrated that the sea cannot become the exclusive property of any nation. And, consequently, the use of the sea for these purposes remains open and common to all mankind."

In a note on the foregoing passage of Wheaton, Mr. Dana adds that—

"The right of one nation to an exclusive jurisdiction over an open sea was, as stated in the text, vested solely on

a kind of prescription. But, however long acquiesced in, such an appropriation is inadmissible in the nature of things, and whatever may be the evidence of the time or nature of the use it is set aside as a bad usage, which no evidence can make legal. The only question now is, whether a given sea or sound is, in fact, as a matter of politico-physical geography, within the exclusive jurisdiction of one nation. The claim of several nations, whose borders surround a large open sea, to combine and make it *mare clausum* against the rest of the world, cannot be admitted. The making of such a claim to the Baltic was the infirmity of the position taken up by the Armed Neutrality in 1780 and 1800, and in the Russian Declaration of War again England in 1807."

He then quotes the following authorities in support of his position: Ortolan, "Dip. de la Mer," I, 120-126; Kent's "Comm." (Abdy's edit.), I, 110-112; Wildman's "Int. Law," I, 71; Heffter, "Europ. Völkerr.," § 75; De Cussy, "Droit Marit.," liv. I, lit. 2, § 39; Halleck's "Int. Law," I, p. 135; Woolsey's "Int. Law," §§ 54-56; Manning's "Law of Nations," 25; Rayneval's "De la Liberté des Mers," II, 1-108; Hautefeuille, "Droits des Nat. Neutr.," liv. I, lit. I, ch. I, § 4; "Twee Gebroeders," Rob. III, 336; "Forty-nine Casks of Brandy," Hagg. III, 290.

Wheaton proceeds to state that—

"By the generally approved usage of nations, which forms the basis of international law, the maritime territory of every territory extends:—

"1. To the ports, harbours, bays, mouths of rivers, and adjacent parts of the sea inclosed by headlands belonging to the same State.

"2. To the distance of a marine league, or so far as a cannon-shot will reach from the shore, along all the coasts of the State.

"3. To the straits and sounds, bounded on both sides by the territory of the same State, so narrow as to be commanded by cannon-shot from both shores, and communicating from one sea to another.

See also §§ 188-190.

"The Behring Sea can be brought under the head of neither strait nor marginal belt. In that it is not entirely surrounded by land, it falls short of the requisites of an inclosed sea. For not only is the Behring Strait 36 miles wide, and the distance between many of the islands forming the southern boundary of this sea far in excess of that, but the distance between the last island of the Aleutian chain and the nearest Russian island of the Commander group is 183 miles.

"Again, regarded as a bay or gulf, the Behring Sea fails to enter the category of closed seas. For waiving all physico-geographical objections to such a classification,

there still remains to its character of closed sea the insuperable objection of impossibility of possession.

"The name bay or gulf does not necessarily carry with it the idea of possessibility, and international law, when importuned to accord such a character to the Behring Sea, cries out with Vattel:—

Droit, &c., t. I, l. I, c. xxiii, § 291.

"'Mais je parle des baies et détroits de peu d'étendue, et non de ces grands espaces de mer, auxquels on donne quelquefois ces noms, tels que la Baie de Hudson, le Détroit de Magellan, sur lesquels l'Empire ne saurait s'étendre, et moins encore la propriété.'"

Under the clauses of the Convention of the 8th February, 1853, the case of the "Washington" came before the Joint Commission for settlement of claims in London, and on the disagreement of the Commissioners was decided by Mr. Joshua Bates in favour of the United States. In his decision he said:—

"The question turns, so far as relates to the Treaty stipulations, on the meaning given to the word 'bays' in the Treaty of 1783. By that Treaty, the Americans had no right to dry and cure fish on the shores and *bays* of Newfoundland; but they had that right on the shores, coasts, *bays*, *harbours*, and *creeks* of Nova Scotia; and, as they must land to cure fish on the shores, bays, and creeks, they were evidently admitted to the shores *of the bays*, *&c.* By the Treaty of 1818, the same right is granted to cure fish on the coasts, bays, &c., of Newfoundland; but the Americans relinquished that right, *and the right to fish within* 3 *miles* of the *coasts*, *bays*, *&c.*, *of Nova Scotia*. Taking it for granted that the framers of the Treaty intended that the word 'bay' or 'bays' should have the same meaning in all cases, and no mention being made of headlands, there appears no doubt that the 'Washington,' in fishing 10 miles from the shore, violated no stipulations of the Treaty.

"It was urged on behalf of the British Government that by 'coasts,' 'bays,' &c., is understood an imaginary line drawn along the coast from headland to headland, and that the jurisdiction of Her Majesty extends 3 marine miles outside of this line; thus closing all the bays on the coast or shore, and that great body of water, called the Bay of Fundy, against Americans and others, making the latter a British bay. This doctrine of the headlands is new, and has received a proper limit in the Convention between France and Great Britain of the 2nd August, 1839;* in which 'it is agreed that the distance of 3 miles, fixed as the general limit for the exclusive right of fishery upon the coasts of the two countries, shall, with respect to bays

* This Convention between France and Great Britain extended the headland doctrine to bays 10 miles wide; thus going beyond the general rule of international law, according to which no bays are treated as within the territorial jurisdiction of a State which are more than 6 miles wide on a straight line measured from one headland to the other.

the mouths of which do not exceed 10 miles in width, be measured from a straight line drawn from headland to headland.'

"The Bay of Fundy is from 65 to 75 miles wide and 130 to 140 miles long; it has several bays on its coast; thus the word 'bay,' as applied to this great body of water, has the same meaning as that applied to the Bay of Biscay, the Bay of Bengal, over which no nation can have the right to assume sovereignty. One of the headlands of the Bay of Fundy is in the United States, and ships bound to Passamaquoddy must sail through a large space of it. The islands of Grand Manan (British) and Little Manan (American) are situated nearly on a line from headland to headland. These islands, as represented in all geographies, are situated in the Atlantic Ocean. The conclusion is therefore in my mind irresistible that the Bay of Fundy is not a British bay, nor a bay within the meaning of the word as used in the Treaties of 1783 and 1818."

The Agent for the United States before the Halifax Fisheries Commission, 1877, quotes this decision, and adds the following note:—

"The Russian claim to extraordinary jurisdiction was expressly founded on a supposed right to hold the Pacific as *mare clausum*, because that nation claimed the territory on both sides:—

"'Un droit exclusif de domaine et de souveraineté de la part d'une nation sur une telle mer n'est incontestable qu'autant que cette mer est *totalement enclavée* dans ce territoire de telle sorte qu'elle en fait partie intégrante, et qu'elle ne peut absolument servir de lieu de communication et de commerce qu'entre les seuls citoyens de cette nation,' or, in the words of Sir Travers Twiss, 'is entirely inclosed by the territory of a nation, and has no other communication with the ocean than by a channel, of which that nation may take possession.' ('Rights and Duties of Nations in time of Peace,' p. 174.)"

Ortolan, "Règles Internationales et Diplomatie de la Mer," vol. i, p. 147.

So Halleck says:—

"21. It is generally admitted that the territory of a State includes the seas, lakes, and rivers entirely inclosed within its limits. Thus, so long as the shores of the Black Sea were exclusively possessed by Turkey, that sea might with propriety be considered as a *mare clausum;* and there seemed no reason to question the right of the Ottoman Porte to exclude other nations from navigating the passage which connects it with the Mediterranean, both shores of this passage being also portions of the Turkish territory. But when Turkey lost a part of her possessions bordering upon this sea, and Russia had formed her commercial establishments on the shores of the Euxine, both that Empire and other Maritime Powers became entitled to participate in the commerce of the Black Sea, and consequently to the free navigation of the Dardanelles and the Bosphorus. This right was expressly recognized by the Treaty of Adrianople in 1829.

* * * *

Halleck's International Law, vol. i, cap. 6, pp. 143-145.

"22. The great inland lakes and their navigable outlets are considered as subject to the same rule as inland seas; where inclosed within the limits of a single State, they are regarded as belonging to the territory of that State; but if different nations occupy their borders, the rule of *mare clausum* cannot be applied to the navigation and use of their waters."

Professor James B. Angell, one of the United States' Plenipotentiaries in the negotiation of the Fisheries Treaty at Washington in 1888, and an eminent jurist in an article entitled "American Rights in Bering Sea," in "The Forum" for November 1889, wrote:—

"Can we sustain a claim that Behring Sea is a closed sea, and so subject to our control? It is, perhaps, impossible to frame a definition of a closed sea which the publicists of all nations will accept. Vattel's closed sea is one "entirely inclosed by the land of a nation, with only a communication with the ocean by a channel of which that nation may take possession.' Hautefeuille substantially adopts this statement, asserting more specifically, however, that the channel must be narrow enough to be defended from the shores. Perels, one of the more eminent of the later German writers, practically accepts Hautefeuille's definition. But so narrow a channel or opening as that indicated by the eminent French writer can hardly be insisted on. Probably, most authorities will regard it as a reasonable requirement that the entrance to the sea should be narrow enough to make the naval occupation of it easy or practicable. We, at least, may be expected to prescribe no definition which would make the Gulf of St. Lawrence a closed sea.

"Behring Sea is not inclosed wholly by our territory. From the most western island in our possession to the nearest point on the Asiatic shore is more than 300 miles. From our most western island (Attou) to the nearest Russian island (Copper Island) is 183 miles. The sea rom east to west measures about 1,100 miles, and from north to south fully 800 miles. The area of the sea must be at least two-thirds as great as that of the Mediterranean, and more than twice that of the North Sea. The Straits of Gibraltar are less than 9 miles wide. The chief entrance to the Gulf of St. Lawrence, which is entirely surrounded by British territory, is only about 50 miles in width. Behring Sea is open on the north by the straits, 36 miles wide, which form a passage way to the Arctic Ocean. On what grounds and after what modern precedent we could set up a claim to hold this great sea, with its wide approaches, as a *mare clausum*, it is not easy to see."

Mr. T. S. Woolsey, Professor of International Law at the Yale Law School, in the sixth edition of T. D. Woolsey's "Treatise on International